SASKATCHEWAN HUMAN RIGHTS COMMISSION

s.2(e) "discrimination" includes, without restricting its generality discrimination on the basis of race, creed, religion, colour, sex, marital status, disability, age, nationality, ancestry, place of origin or any other ground which results in adverse differential treatment of any person or class of persons.

85-5448/

Saskatchewan Human Rights Commission
1984 Annual Report

The Saskatchewan Human Rights Code states:

3. The objects of this Act are:

   (a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and

   (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

A TIME FOR CHANGE

Saskatchewan Human Rights Commission

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March 29, 1985.

The Honourable J. Gary Lane, Q. C.,
Minister of Justice and Attorney General,
Room 345, Legislative Building,
Regina, Saskatchewan.

Dear Mr. Lane:

It is with pleasure that I submit the 1984 Annual Report for the Saskatchewan Human Rights Commission. It has been a year of ups and downs, frustrations and achievements, but it has always been challenging. I would briefly like to touch on three areas that have been of particular interest in 1984 and which will continue to be of interest in 1985.

First, the Saskatchewan Human Rights Commission has reviewed The Saskatchewan Human Rights Code and has developed proposed amendments to be considered by the Government in the 1985 spring sitting of the Legislature. The most important recommendation is that the Code be amended to prohibit discrimination on any ground. The Code would then reflect the provisions of Section 15 of the Canadian Charter of Rights and Freedoms. The Commission has also recommended amendments that would increase the independence of the Commission. The implementation of these amendments would affirm to the public that the Commission is independent from government.

Secondly, the Commission decided that in 1984 and 1985 it would focus on the question of whether persons of Indian ancestry were receiving equal benefit from our education system. To this end, we held public hearings to review this question and to determine the steps that might be taken to correct any inequities that may exist.

Thirdly, the Government of Saskatchewan has announced an affirmative action program for the public service and we commend the government for taking this step. We note that some Crown Corporations have proceeded with Affirmative Action Programs. However, the Commission is most disappointed that the Saskatchewan Power Corporation has allowed the interim approval of their affirmative action program to lapse and has decided not to seek legal approval for their complete program.

The Commission observes, with great concern, that the voluntary approach to affirmative action programs has not been successful. Over the last number of years we have heard more and more Canadians asking for mandatory affirmative action through such reports as: "Work for Tomorrow", "Equality Now!", and "Employment Equity". As a first step toward mandatory affirmative action programs we request the government to adopt a policy of contract compliance by which the government would do business only with organizations and businesses that have a legally approved affirmative action program in place.

The Commission is looking forward to a most interesting year in 1985 and, in particular, to April 17, 1985 when Section 15 of the Charter of Rights and Freedoms comes into force.

Yours sincerely,

Ronald J. Kruzeniski,
Chief Commissioner.

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Looking Forward

Amendments to The Saskatchewan Human Rights Code

In December 1984, the Saskatchewan Human Rights Commission submitted to the Minister of Justice, the Honourable Gary Lane, a brief on proposed amendments to *The Saskatchewan Human Rights Code*.

The proposed changes to *The Saskatchewan Human Rights Code*, the first major changes since it was proclaimed in 1979, have three purposes. They are:

1. To achieve compliance with Section 15 of the *Canadian Charter of Rights and Freedoms;*
2. To make the Commission more independent;
3. To make the Code more effective in obtaining the objectives provided for in the legislation through changes that are both substantive and procedural in nature.

Section 15 of the *Charter of Rights and Freedoms*, otherwise known as the "equality section" states:

(1) *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

(2) *Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

The Commission believes that, by its wording, the Charter prohibits all forms of discrimination. In keeping with this interpretation, the Commission has recommended that *The Saskatchewan Human Rights Code* be amended to provide for an open-ended definition of discrimination which would prohibit discrimination against any person or class of persons.

The Commission has recommended that the definition of discrimination read as follows:

> *"discrimination" includes, without restricting its generality discrimination on the basis of race, creed, religion, colour, sex, marital status, disability, age, nationality, ancestry, place of origin, or any other ground which results in adverse differential treatment of any person or class of persons.*

The Commission has also recommended that several changes be made to the Code in order to enhance the Commission's independence. The Commission has stated that in order to foster confidence in the Commission's impartiality it is necessary that it become independent from the Government of the day. Therefore, the Commission has recommended that, among other things, the appointment of Commission members be made on the recommendation of the Legislative Assembly as a whole, a procedure presently used for the appointment of the Ombudsman, rather than by an Order in Council appointment. The Commission has recommended that it report to the Legislative Assembly through the Speaker of the House as does the Ombudsman and the Provincial Auditor, and that the Commission assume responsibility for the appointment of the Director of the Commission, whose appointment is presently made by the Lieutenant Governor in Council.

A number of substantive and procedural changes to the Code have also been proposed. These changes include amending the definition of "employee" so that domestic workers and farm workers are protected by the Code, except in situations where they provide medical or personal care to their employer or their employer's family. As well, changes are proposed which would ensure that non-profit corporations are subject to the provisions of *The Saskatchewan Human Rights Code*, except that preference may be given in hiring to persons who are members of the group whose interests the organization serves.

Other amendments proposed by the Commission are: the inclusion of a general anti-harassment section, an increase from $5,000.00 to $10,000.00 as the amount of compensation that can be awarded a person injured by a contravention of *The Saskatchewan Human Rights Code*, and the inclusion of a section which will prevent discrimination in employment by those businesses who receive government contracts, grants and loans.

The Commission believes that the changes it has proposed will have the effect of maintaining Saskatchewan's place in the forefront of protecting individual rights and freedoms. By incorporating an open-ended definition of discrimination in *The Saskatchewan Human Rights Code*, Saskatchewan will be acknowledging that those rights considered so basic to human existence and functioning are *every* person's right in this province. Further, the proposed definition is consistent with the wording of Section 15 of the *Charter of Rights and Freedoms*. A more independent Commission will assist in fostering confidence in the Commission's impartiality and thus increase its effectiveness. The Commission further believes that the other proposed changes will enhance the operation of the Code and streamline the procedures used by the Commission to implement the Code.

THE SASKATCHEWAN HUMAN RIGHTS COMMISSION URGES THE GOVERNMENT OF SASKATCHEWAN TO AMEND *THE SASKATCHEWAN HUMAN RIGHTS CODE* AS PROPOSED.

Mandatory Affirmative Action Programs

Legal provisions for the implementation of affirmative action programs have been in place in Saskatchewan since *The Saskatchewan Human Rights Code* was introduced in 1979. Affirmative action programs are designed to eliminate and counteract disadvantages experienced by persons of Indian ancestry, women and persons with physical disabilities. Employment and education institutions can sponsor such programs and can apply to the Saskatchewan Human Rights Commission for an approval, which gives the program legal protection and sanction. The implementation of such programs is presently done on a voluntary basis. In its 1983 Annual Report, the Commission reported that the results of a voluntary affirmative action program have been disheartening. It can now report that, after another year's experience with voluntary affirmative action programs, the results are even more disheartening.

During 1984, the Saskatchewan Human Rights Commission approved only two affirmative action programs. Of the twenty-three programs approved by the Commission since 1979, only eighteen are currently in place (see Table IX). The sponsor organizations of the other five programs have allowed their approval to lapse. Two of these previous sponsor organizations are the Saskatchewan Power Corporation and the Potash Corporation of Saskatchewan.

Of the eighteen programs presently approved by the Commission, nine are employment programs, and of these nine, only five address all three target groups — women, persons of Indian ancestry and persons with physical disabilities.

Only four of the twenty-one Crown Corporations have approved affirmative action programs, and they are Saskatchewan Telecommunications (Sask Tel), Saskatchewan Government Insurance Corporation (S.G.I.), Saskatchewan Computer Utility Corporation (SaskCOMP) and Saskatchewan Oil and Gas Corporation. (Sask Oil's program is currently being updated.)

The Commission's five year experience with affirmative action demonstrates that the voluntary introduction of affirmative action programs does not have a significant impact on opportunities for members of disadvantaged groups. Current statistics show that the wage gap between males and females is widening, and persons of Indian ancestry and persons with physical disabilities experience an extremely high rate of unemployment.

THE SASKATCHEWAN HUMAN RIGHTS COMMISSION URGES THE GOVERNMENT OF SASKATCHEWAN TO ISSUE CONTRACTS, LOANS, GRANTS, AND LEASES ONLY TO BUSINESSES WHICH HAVE UNDERTAKEN AN AFFIRMATIVE ACTION PROGRAM.

Accessibility Legislation

The Saskatchewan Human Rights Code prohibits discrimination in employment, housing, public accommodation and educational institutions on the basis of race, sex, and physical disability, to name a few. This means that the design of the building must not interfere with an individual's right to take part in the services or facilities which the building provides.

In order to assist architects, builders and owners of buildings who are designing new buildings, additions to existing buildings or renovating buildings, the Saskatchewan Human Rights Commission has, for the past three years, urged the Government of Saskatchewan to implement accessibility legislation which would ensure that all new buildings and newly renovated areas of buildings are accessible to persons with physical disabilities.

The provincial government introduced Bill 19 (An Act Respecting Building and Accessibility Standards and the Inspection of Buildings) in December 1983. In May, 1984 an amended Bill 19 was reintroduced into the Legislature and passed. Subsequent to the passage of the Bill, which is yet to be proclaimed, the Department of Labour set up a committee to finalize the drafting of the Accessibility Regulations. The work of the Committee is nearing completion.

THE SASKATCHEWAN HUMAN RIGHTS COMMISSION URGES THE GOVERNMENT OF SASKATCHEWAN TO PROCLAIM *AN ACT RESPECTING BUILDING ACCESSIBILITY STANDARDS AND THE INSPECTION OF BUILDINGS* AND ITS REGULATIONS IMMEDIATELY AND THAT THE ACT AND REGULATIONS COME INTO EFFECT ON OR BEFORE OCTOBER 1, 1985. IT FURTHER URGES THE GOVERNMENT TO WORK WITH MUNICIPALITIES SO THAT PROCEDURES FOR THE ENFORCEMENT OF THE REGULATIONS ARE IN PLACE BY THE TIME THEY ARE IN EFFECT.

The Mandate of the Commission

The Saskatchewan Human Rights Commission is a law enforcement agency responsible for the administration of *The Saskatchewan Human Rights Code*. Section 3 of the Code states that:

3. The objects of this Act are:

   a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and

   b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

These objects are derived from the *Universal Declaration of Human Rights* adopted by the General Assembly of the United Nations in 1948.

The Code gives the Saskatchewan Human Rights Commission the authority to investigate and settle complaints of discrimination, to carry complaints before Boards of Inquiry, to approve or order affirmative action programs, to grant exemptions from certain provisions of the Code, to make regulations subject to the approval of the Lieutenant-Governor-in-Council, and to carry out research and educational programs which will advance the principles of equality and eliminate discriminatory practices.

The Structure of the Commission

The Commission has in the past been composed of seven Commissioners appointed by the Lieutenant-Governor-in-Council, one of whom is the Chief Commissioner and another the Deputy Chief Commissioner. As of the end of this reporting year there were five commission members due to the resignation of two members. The Commission sets policy, approves settlements of complaints, reviews complaints which are dismissed, and considers applications for affirmative action programs and exemptions.

The staff of the Commission is divided into three divisions: investigation, affirmative action and education.

The Investigation Division is staffed with six Investigating Officers, a Chief Human Rights Officer and a Staff Counsel. (During 1984, the usual complement of six Investigating Officers was reduced to five due to budget constraints). The Investigation Division is responsible for receiving, investigating, and settling complaints of discrimination. Complaints which cannot be settled are referred to the Commission, who may direct that a Board of Inquiry be appointed to hear and decide the matter. At such a hearing, the Commission represents the complainant and presents evidence regarding the complaint to the Board of Inquiry.

The Affirmative Action Division, with two Affirmative Action Officers, reviews and monitors all affirmative action programs brought to the Commission for approval. They also review all applications requesting exemptions from certain provisions of the Code.

The Education Division, composed of a Director of Education and two Education Officers, is responsible for providing information on human rights to the public. (During 1984, the usual complement of two Education Officers was reduced to one for a 10½ month period, due to budget constraints). The Division conducts workshops, makes public presentations and consults with educational institutions and community organizations. They are also responsible for conducting research into human rights issues.

Law Enforcement

The Saskatchewan Human Rights Code

The basic protections afforded by *The Saskatchewan Human Rights Code* are set out in two substantive sections. Part I of the Code contains the Bill of Rights, which protects the fundamental rights and freedoms of all residents of Saskatchewan. The Bill of Rights guarantees freedom of conscience, freedom of expression and association, freedom from arbitrary arrest and detention, and the right of all adult citizens to vote in provincial elections at least once every five years.

Part II of the Code protects the rights of all residents to equality. Discrimination is prohibited in the following areas: employment; employment applications and advertisements; rental of housing accommodation; purchase of property; provision of accommodation, services and facilities to the public; education; publication and display of signs and notices; membership in trade unions, professional societies and occupational associations; and contracts.

The prohibited grounds of discrimination are race, creed, religion, colour, sex, marital status, physical disability, age (18 to 64), nationality, ancestry and place of origin.

Enforcement Procedures

Any person who has reasonable grounds to believe that a provision of the Code has been violated may file a complaint with the Saskatchewan Human Rights Commission. In addition, the Commission may initiate a complaint on its own authority.

A preliminary informal investigation is undertaken to determine whether the complaint falls within the jurisdiction of *The Saskatchewan Human Rights Code*, and if there are reasonable grounds to believe that the Code has been violated.

When a formal complaint is filed, a Human Rights Officer is appointed to investigate, and through investigation the Officer determines whether there is evidence to substantiate the allegation that a provision of the Code has been violated. A Human Rights Officer has the legal authority to examine records and documents and to obtain information pertinent to the complaint.

Where the investigation does not substantiate the allegation and there is no probable cause to believe the Code has been violated, the complaint file is closed, or the complaint is formally dismissed. However, where the evidence gathered through investigation supports the claim, an attempt to settle the complaint is made.

A settlement may take any form which is appropriate to the circumstances of the complainant and the respondent, the nature of the violation, and the opportunities lost or damages caused (see p. 5 for examples of settlements).

If a settlement cannot be effected, the Human Rights Commission may direct that the Attorney General appoint an independent Board of Inquiry, composed of one or more persons, to hear and decide the matter. The Board of Inquiry hears the evidence of both the complainant and the respondent.

When a Board is appointed, the Commission has carriage of the complaint, and the Commission's legal counsel appears before the Board to present the Commission's evidence and argument. The complainant may rely on the Commission's representation, or retain their own legal counsel at their own expense.

If a Board of Inquiry finds that a contravention of the Code has occurred, it may order the person, company or organization who contravened the Code to comply with the legislation, to rectify any injury caused, to pay compensation for expenses or lost wages, or to pay damages for humiliation suffered. An order of a Board of Inquiry may be appealed on a question of law to the courts.

Nature and Disposition of Informal Complaints

The Saskatchewan Human Rights Commission received and investigated 294 informal complaints during 1984. Complaints are accepted informally when preliminary investigation is required to determine jurisdictional issues or to establish that there are reasonable grounds to believe the Code has been violated. Some informal complaints are filed as formal complaints subsequent to the preliminary examination, and others are resolved at this informal stage.

During 1984 there was a reduction in the number of informal complaints under investigation compared to 1983. However, this was due to the streamlining of investigative procedures which the Commission implemented during 1984. More of these complaints are now handled at the miscellaneous inquiry stage. This can be evidenced by the 11% increase of miscellaneous inquiries in 1984.

The informal complaints filed during this period show that complaints received in the area of employment are the highest (51.5%) followed by public services (14.5%), and application forms (12.5%). These three areas account for 78.5% of the informal complaints filed with the Commission (see Table I).

Complaints of discrimination on the grounds of sex (31%), race (15%), and physical disability (16.5%) are the most frequently alleged informal complaints (see Table I).

Sexual harassment complaints comprise 15% of all complaints, while 12% of all informal complaints are filed by persons of Indian ancestry.

Informal complaints in the area of employment consist mainly of those alleging discrimination because of sex, physical disability, race and age. The highest number of informal complaints in the area of public services were made on the basis of race, sex, and physical disability. Race discrimination accounts for the majority of informal complaints in the housing category (see Table I).

Of the 294 informal complaints received in 1984, 39 have been settled, 34 have been withdrawn, 101 have been transferred to formal inquiries, 27 were concluded to have no reasonable grounds, and 93 are presently under investigation (see Table II).

Nature and Disposition of Formal Complaints

The Saskatchewan Human Rights Commission investigated 245 formal complaints in 1984, an increase of 13.5% over 1983. Discrimination in employment is still the most significant area of complaint, accounting for 65% of the formal complaints filed with the Saskatchewan Human Rights Commission. Complaints in the area of public services comprised 14.5% of all formal complaints, while complaints in the area of housing accommodation comprise 10% of the total number of complaints. Therefore, these three areas — employment, public services and housing accommodation — account for 89.5% of the formal complaints filed during the reporting period (See Table III).

Sex discrimination continues to be the most frequently alleged ground of complaint (40%), followed by complaints on the basis of physical disability (20%). Race discrimination complaints account for 16% of the formal complaints during 1984.

As in 1983, the highest number of complaints in the employment area are under the category of sex discrimination. Sexual harassment complaints account for 22% of all complaints. Complaints on the basis of physical disability and age are also prevalent.

Discrimination on the basis of physical disability made up the majority of complaints in the area of public services.

Of the 245 formal complaints alleging violations of the Code, 25 have been withdrawn, 36 were found to have no probable cause to believe a violation of the Code occurred, 64 complaints were found to have probable cause to believe a violation of the law occurred, and 126 are presently under investigation (see Table IV).

Nature and Disposition of Probable Cause Complaints

Probable cause complaints are those complaints where the Director finds that probable cause exists to believe a violation of the Code has occurred because the evidence gathered through investigation supports an allegation of discrimination. These complaints then proceed to the settlement stage.

During 1984, the Director of the Commission made probable cause findings in 64 complaints. Of these, 14 complaints were settled between the parties, 3 were withdrawn by the complainants, and 7 were referred to the Saskatchewan Human Rights Commission, who directed a Board of Inquiry in each of the complaints (see Table VI). There are presently 40 probable cause complaints in the settlement process (see Table V).

Settlement

The mandate of the Saskatchewan Human Rights Commission with respect to complaints is twofold. According to the requirements of Section 28(1) of the Code, the Commission must inquire into complaints and endeavour to effect a settlement. Therefore, in each complaint where a determination is made that probable cause exists to believe a violation of the Code has occurred, the Commission must attempt to effect settlement. The settlement of a complaint is designed to remedy the situation and put the complainant in the situation he/she would have been in had the discrimination not occurred. Elimination of discriminatory practices which violate *The Saskatchewan Human Rights Code* is both a policy and the law of this province and settlements of complaints must reflect this. The following are some examples of complaints which were settled during 1984.

Example #1 — Sexual Harassment

On September 13, 1984 the Commission settled a complaint filed by Lisa Avram and Trudy Johnson against Terry Denouden and Alex Marion Restaurants Limited. No admission of a violation of *The Saskatchewan Human Rights Code* was made by the respondents. Ms. Avram and Ms. Johnson alleged that they had been sexually harassed by their supervisor, and in the case of one of the complainants by a maintenance worker, while working at McDonald's South Albert Restaurant in Regina, in violation of Section 16 of *The Saskatchewan Human Rights Code*. The respondents, Terry Denouden and Alex Marion Restaurants Limited, agreed to provide the complainants with a letter of apology from their supervisor, a letter of reference regarding their employment, and a monetary payment of $1,500.00 to Trudy Johnson and $2,500.00 to Lisa Avram.

Example #2 — Physical Disability

On October 11, 1984 a complaint filed by Larry Gilecki against Duncan Pavlis and the Commodore Restaurant in Saskatoon was settled. Mr. Gilecki alleged he had been discriminated against because of his physical disability in violation of Section 12 of *The Saskatchewan Human Rights Code*. Mr. Gilecki said that he had been told not to return to the restaurant after having an epileptic seizure, unless he took his medication and changed his doctor. He further alleged he was refused entrance to the restaurant on a subsequent occasion.

In settling the matter, the respondents agreed to provide the complainant with a letter of apology, to inform themselves and their staff of the provisions of the Code, to extend an open invitation to the complainant to attend at the restaurant and to dine there at any time, and to pay the complainant $1,000.00.

Example #3 — Sex Discrimination

An agreement was entered into on May 10, 1984 settling a complaint made by Dave Drysdale and Bill Juraville against England's Jewellers Limited, Regina. Mr. Drysdale and Mr. Juraville alleged that England's Jewellers Limited in Regina refused to consider their applications for positions of sales clerks because they were men, in violation of Section 16 of *The Saskatchewan Human Rights Code*. While the company did not admit that it had discriminated, it agreed to pay Mr. Juraville and Mr. Drysdale $200.00 in general unspecified damages. The company also agreed to inform itself through its lawyer of the provisions of *The Saskatchewan Human Rights Code*.

Example #4 — Religious Discrimination

The complaint of Ruth Satin against Filene's Fashion Ltd. and Colleen Polowick was settled on November 8, 1984, without any admission of a violation of *The Saskatchewan Human Rights Code* being made by the respondents. Ruth Satin complained that she had been discriminated against because of her religion, in violation of Section 4 and 16(1) of the Code. Ms. Satin, a Jewish woman, alleged she had requested three days off — September 8th, 9th and 17th, 1983 — to observe the Jewish laws of the holy days, Rosh Hashanna and Yom Kippur, which forbid working on these days. Ms. Satin further alleged that her supervisor agreed to give her September 9th off as a regular day off, but advised her if she did not work on September 8th she would be fired. Ms. Satin said that when she did not report to work on September 8th her employment was terminated. In settlement, the respondents agreed to pay Ms. Satin $3,000.00 in full and final satisfaction of losses in respect of feelings or self-respect. The respondents further agreed to inform themselves, through their lawyers, of the provisions of *The Saskatchewan Human Rights Code*.

Boards of Inquiry

A. The Saskatchewan Human Rights Code

During 1984, Boards of Inquiry were directed in seven complaints. Of these seven complaints, five were settled, one has had a Board of Inquiry appointed, and one is awaiting the appointment of a Board of Inquiry by the Attorney General. The following are summaries of these complaints.

1. *Allison Strobbe, Tracy Marshall, Jackie Jones and Lucy Harrison v. Harry Ball and Nor Pac Marketing* — Four complaints of sex discrimination were filed by the complainants, who alleged they were sexually harassed by Harry Ball while working for Nor Pac Marketing. Robert Finlay was appointed as a one person Board of Inquiry to hear this complaint. The Board of Inquiry convened on July 18th, 1984, but was adjourned pending settlement of the matter between the complainants and Nor Pac Marketing Ltd. Without admitting any violation of Section 16 of *The Saskatchewan Human Rights Code*, Nor Pac Marketing Ltd. agreed to pay $400.00 in compensation to each of the four complainants.

2. *Adrienne Kares v. Saskatoon Transit System* — D. Albert Lavoie was appointed as a one member Board of Inquiry to hear the complaint of Adrienne Kares. Ms. Kares alleged she was refused employment as a bus driver with the Saskatoon Transit System because of her sex and marital status. The Board of Inquiry convened on November 28th, 1984. The complaint was settled just prior to the Board convening. The parties agreed to the adjournment of the Board of Inquiry until April 1, 1986 to ensure that the terms of the settlement are adhered to.

3. *Robert Fink v. City of Saskatoon* — The complaint of Robert Fink against the City of Saskatoon was scheduled to be heard by Robert Finlay, Board of Inquiry, on March 13th to 15th, 1985. Mr. Fink alleges in his complaint that By-law No. 5138, Part 11(14) of the City of Saskatoon interferes with his freedom of speech, in contravention of Section 5 of *The Saskatchewan Human Rights Code*. That section of the by-law prohibits the placing of posters, bills or announcements on property owned or controlled by the City, without permission of City Council, and also provides the City Administration with the authority to remove all posters from civic facilities.

4. On August 9, 1984 the Commission directed the Attorney General to appoint a Board of Inquiry in a complaint of sexual harassment in employment. Since the Board of Inquiry has not yet been appointed, the details of this complaint cannot be disclosed.

During 1984, the following complaints were adjudicated by Boards of Inquiry which were directed by the Commission in 1983.

1. *Len Craig v. The City of Saskatoon and the Saskatoon Professional Fire Fighters Union Local 80 of the International Association of Fire Fighters* — E. Robert Stromberg, Board of Inquiry, ruled that the mandatory provision of the Collective Bargaining Agreement between the City of Saskatoon and the Saskatoon Professional Fire Fighters Association was not discriminatory in that age 60 is a reasonable occupational qualification and requirement for the position of a fire fighter. The complaint was brought forward by Len Craig, who alleged that he was discriminated against because of his age when his employment as fire marshall with the Saskatoon Fire Department was terminated upon reaching age 60. The

Saskatchewan Human Rights Commission appealed this decision, and the appeal was heard in the Court of Queen's Bench on July 31, 1984. The court reserved its decision.

2. *Sandiford v. Jenkins and Base Communications* — Randy Katzman, a one person Board of Inquiry, heard the complaint on January 26th and 27th, 1984. In his decision, Mr. Katzman ruled that Ms. Sandiford was discriminated against because of her physical disability when she was terminated from her position as switchboard operator at Base Communications in violation of Section 16 of the Code. Base Communications was ordered to pay Cheryl Sandiford $1,500.00 as compensation in respect of hurt feelings and an additional $1,360.00 for lost wages.

3. *Charles Wagamese v. Ruth Genest* — Robert Finlay, Board of Inquiry, ruled that Ruth Genest had discriminated against Charles Wagamese when he was refused housing accommodation on the basis of his race and ancestry, contrary to Section 11(1) of *The Saskatchewan Human Rights Code*. The Board ordered Ruth Genest to pay compensation in the sum of $400.00 to Charles Wagamese in respect of humiliation and hurt feelings. It further ruled that Ms. Genest is to notify the Saskatchewan Human Rights Commission of any vacancies in any rental property owned by her for a period of six months. If she refuses accommodation to persons of Indian ancestry, she is to provide the Commission with a written reason.

4. *Claudette Phillips (Auger) v. John Hermiz and Hermiz Electronics Service* — On September 28th, 1984 Randy Katzman, Board of Inquiry, ruled that Claudette Phillips had been sexually harassed by her employer, John Hermiz, of Hermiz Electronics Service. Ms. Phillips began her employment with Hermiz Electronics Service in November, 1982 and was subjected to both physical and verbal sexual harassment. She refused to comply with the sexual demands of her employer, which led to a reduction in her work hours and finally to the termination of her employment in January, 1983. In its decision the Board stated that it, "... finds that the respondent (Hermiz) attempted to exact sexual favours from the complainant and her refusal to provide such was the reason for reduction of her hours of work and then termination of her job." The Board also stated that it, "... has no alternative but to conclude that the respondent breached Section 16 of *The Saskatchewan Human Rights Code* as he discriminated against her because of her sex." The Board ordered the respondent to compensate Ms. Phillips $425.00 for lost wages and $1,750.00 in respect of hurt feelings and loss of self-esteem.

5. *Weatherall v. City of Moose Jaw* — James Weatherall alleged that he was terminated from his position as labourer with the City of Moose Jaw because of a physical disability, that being high blood pressure contrary to Section 16 of the Code. A Board of Inquiry was underway when the City of Moose Jaw agreed to settle the matter. Settlement included $5,000.00 as compensation for suffering in respect of feelings or self respect. The City of Moose Jaw also agreed to pay backpay with full benefits and to abide by the Saskatchewan Human Rights Commission's Exemption Order 82/12E0, prohibiting the use of pre-employment medicals.

6. *Fernie Letendre v. Hepburn Co-op and Harold (Bud) Jackson* — Robert Finlay was appointed as a one person Board of Inquiry to hear two complaints made by Fernie Letendre against Hepburn Co-op and Harold (Bud) Jackson. Ms. Letendre's first complaint alleged she had been denied a promotion to the position of grocery manager because of her sex, contrary to Section 16(1) of *The Saskatchewan Human Rights Code*. Ms. Letendre's second complaint alleged that, after she had been laid off, she was not recalled to work at the Hepburn Co-op for part-time work because she had made a complaint under the Code, in violation of Section 45 of *The Saskatchewan Human Rights Code* which prohibits a person from discriminating against another because they have made a complaint. The Board of Inquiry was scheduled to convene on April 9th and 10th, 1984 in Hepburn, Sask. Prior to the Board of Inquiry convening, the parties reached a settlement of this matter. The Board of Inquiry issued a Consent Order on April 9th, 1984, ordering Hepburn Co-op and Harold (Bud) Jackson to pay $2,000.00 to Fernie Letendre in full settlement of the complaints. The respondents did not admit any liability with respect to Ms. Letendre's allegations.

During 1984, the following complaints were appealed to the courts:

1. *Roy Day v. The City of Moose Jaw and Moose Jaw Fire Fighters Association* — The Court of Queen's Bench overturned a Board of Inquiry decision which had said that Mr. Roy Day had been discriminated against because of his age when he was forced to retire at the age of 62, according to the Collective Agreement between the City of Moose Jaw and the Moose Jaw Fire Fighters Association in violation of Section 16(1) of *The Saskatchewan Human Rights Code*. The Commission has filed a notice of appeal in the Court of Appeal for Saskatchewan. The appeal is expected to be heard in 1985.

2. *Engineering Students Society et al. v. Havemann et al.* — A Board of Inquiry decision which ruled that certain issues of the Engineering Students Society Paper "The Red Eye" ridiculed, belittled and affronted the dignity of women, has been appealed by the Engineering Students Society and individual

respondents to the Court of Queen's Bench. The hearing was held on July 26th and 27th. A decision was reserved.

3. *Huck v. Canadian Odeon Theatres:* The decision of the Court of Queen's Bench dated June 30th, 1982 has been appealed to the Court of Appeal and was heard on January 17th, 1984. The Court of Queen's Bench reversed the decision of the Board of Inquiry and said that *The Saskatchewan Human Rights Code* requires only that providers of service make their facilities available to physically disabled people in the same manner as they make it available to other members of the public. Huck filed a complaint against Canadian Odeon Theatres because of the lack of adequate seating in the theatre for wheelchair users when he was required to sit in front of the front row of seats. The decision of the Court of Appeal was reserved.

4. *Scowby et al. v. Peter Glendinning:* The decision of the Court of Appeal for Saskatchewan ruling that the Saskatchewan Human Rights Commission has jurisdiction to deal with complaints against individual R.C.M.P. Officers has been appealed to the Supreme Court of Canada. The application made by the R.C.M.P. Officers for Leave to Appeal was heard on June 20th, 1983, and leave was granted. The appeal is scheduled to be heard on February 19, 1985.

The following complaints were adjudicated by Boards of Inquiry prior to 1984. However, decisions have not yet been rendered.

1. *Anderson v. Violet Woloshyn and SEDCO:* A hearing into the complaint of Evelyn Anderson v. Violet Woloshyn and SEDCO took place on June 27th, 28th and 29th, 1983 in Regina. Irving Goldenberg, a one person Board of Inquiry appointed to hear the matter, heard evidence into the complaint of Ms. Anderson, who alleged she was refused a transfer to a position of receptionist at SEDCO because of a physical disability. The Board requested written arguments from the parties. A decision has not yet been rendered.

2. *S.H.R.C. v. Citation Investments Limited, Quadra Investments Ltd. and Cudlow Holdings Limited:* Elizabeth Halstead sat as a Board of Inquiry on May 26th, 1983 to hear three complaints alleging that the landlords discriminated on the basis of marital status when they charged higher rent to single people sharing suites than to married couples renting similar suites. The Board has not yet handed down its decision.

B. The Labour Standards Act

As provided for in Sections 19 and 20 of *The Labour Standards Act*, the Saskatchewan Human Rights Commission sits as the adjudicating body for equal pay complaints which are referred to it after investigation by the Department of Labour.

During this reporting period, the following complaint was referred to the Saskatchewan Human Rights Commission for adjudication by the Department of Labour:

Lisa Fiorante v. Sherwood Co-operative Association Ltd. — Ms. Fiorante filed a complaint with the Labour Standards Branch of the Department of Labour alleging a violation of Section 17(1) of *The Labour Standards Act*. The complaint alleges that Sherwood Co-operative Association, Sherwood Village Mall in Regina, discriminated against Ms. Fiorante, employed as a Food Clerk, by paying her at a lower rate of pay than that paid to a male Food Clerk, for work that is similar. At the time of the complaint both worked in the Drug Department. The hearing is scheduled for January, 1985.

The following decision of the Saskatchewan Human Rights Commission was appealed to the Courts in 1983, but was not yet heard in 1984:

Beatrice Harmatiuk et al. v. Pasqua Hospital, The Board of Governors of the South Saskatchewan Hospital Centre: By a decision dated December 1st, 1982, the Saskatchewan Human Rights Commission ruled that Pasqua Hospital was in violation of Section 17 of *The Labour Standards Act* by paying female housekeeping aides at a rate of pay less than that paid to male caretakers employed at the hospital, and that the housekeeping aides and caretakers performed similar work. Pasqua Hospital appealed this decision to the Court of Queen's Bench. The appeal was heard on April 7th, 1983, and in a decision dated June 30th, 1983, Mr. Justice E. A. Sheibel upheld the decision of the Commission and dismissed the appeal. Pasqua Hospital is appealing the Queen's Bench Court decision to the Court of Appeal. No dates have been scheduled.

Miscellaneous Inquiries

During the 1984 reporting period the Commission handled 4,519 miscellaneous inquiries, an increase of 11% over 1983. These inquiries include requests for information and interpretation of Human Rights Laws, requests for pamphlets and brochures, as well as inquiries which require referrals to other agencies.

Special Programs — Affirmative Action

Affirmative action programs address the disadvantages experienced by persons of Indian ancestry, persons with physical disabilities and women, by consciously measuring representation by race, sex and physical disability in order to identify and remove the systemic barriers which may adversely affect these groups, and increase their participation in employment and education. An affirmative action plan represents a commitment to alter the policies, practices and procedures of institutions so as to open the door for members of the target groups. The facts regarding unemployment and underutilization of members of all three target groups continues to provide disturbing evidence that members of these target groups have historically been disadvantaged and are still affected in today's workplaces and educational institutions.

While these disparities in economic status stem from a complex set of factors, they provide strong evidence of the persistence of systemic discriminatory practices in the workplace and in related institutions. Considered in this context, the purpose of affirmative action initiatives are to eliminate the institutional barriers which have excluded these groups and to redress present imbalances in our labour force.

The Saskatchewan Human Rights Code provides four ways in which affirmative action programs can be introduced:

1. The Commission may approve a voluntary program (Section 47);
2. The Commission may order that a program be put into place (Section 47);
3. A Board of Inquiry may order a program as a remedy where there is evidence of discrimination (Section 31(7)(a));
4. An affirmative action program may be introduced as settlement of a complaint.

The approval of a program under Section 47 provides the applicant with legal protection for any preferential measures which may be undertaken. With the proclamation of Section 15(2) of the *Charter of Rights and Freedoms*, on April 17th, 1985, additional Constitutional protection for affirmative action will be in place.

In 1984 the Saskatchewan Human Rights Commission granted approval to two affirmative action programs and extended one interim approval pursuant to Section 47 of *The Saskatchewan Human Rights Code*. Two of these programs were initiated by Saskatchewan Crown Corporations and are comprehensive programs which address the employment opportunities of all three target groups. Upon a request from the City of Regina, the Commission granted an extension of the City's interim approval on the condition that a comprehensive program be submitted to the Commission by November, 1985.

The Saskatchewan Human Rights Commission held public hearings in June 1984 in order to monitor approved affirmative action programs and the applicants' compliance with the approval criteria and specified conditions of approval pursuant to Section 42 of the Regulations to the Code. The Commission considered the Annual Reports which sponsor organizations are required by law to submit to the Saskatchewan Human Rights Commission by April 30th of each year. The oral hearing provided sponsor organizations with an opportunity to inform the Commission and the public at large of their progress in the implementation of their affirmative action programs. The Commission is planning on holding similar hearings in June, 1985.

Approved Affirmative Action Programs

The following programs were granted approval pursuant to the proposed affirmative action regulations adopted by the Saskatchewan Human Rights Commission on April 9th, 1980 and Section 47 of *The Saskatchewan Human Rights Code*.

1. Saskatchewan Government Insurance Corporation

On February 16th, 1984, the Saskatchewan Human Rights Commission granted approval, pursuant to Section 47 of *The Saskatchewan Human Rights Code*, to the Saskatchewan Government Insurance Corporation and the Office of Professional Employees Union Local 397, to implement a comprehensive affirmative action program. The program is aimed at improving and advancing the employment opportunities of women, persons of Indian ancestry and persons with physical disabilities, and is applicable to all departments, divisions, and branch offices.

At the time of their approval, SGI had a complement of 1,342 employees in its workforce. A workforce analysis indicated that 662 or 49% were male, 634 or 47% were female, 14 or 1% were of Indian ancestry and 32 or 3% were persons with physical disabilities. A further analysis revealed that women were not proportionately distributed throughout the workforce. The majority of female employees (74%) were located in clerical positions and were noticeably underrepresented in the management, technical and trade areas. As well, the analysis indicated that persons of Indian ancestry and persons with physical disabilities were seriously underrepresented in all occupational categories within the SGI workforce.

In order to correct this imbalance, SGI has set goals and timetables for the recruitment, hiring and promotion of the three target groups, which will ultimately result in a workforce which contains 11.5% persons of Indian ancestry, 7.1% persons with physical disabilities and 39% women in each occupational category. A workforce composition of this nature will reflect the proportionate representation of the three target groups in the available labour pool. SGI intends to achieve these goals over a twenty year time period and has instituted a number of special measures which will facilitate the attainment of these goals.

SGI's affirmative action program was jointly designed by an affirmative action committee which consisted of equal representation from both union and management. This committee will continue to review and monitor the progress of the program during the implementation stage.

2. Saskatchewan Computer Utilities Corporation

On December 19th, 1984, the Saskatchewan Human Rights Commission granted approval, pursuant to Section 47 of *The Saskatchewan Human Rights Code,* to the Saskatchewan Computer Utilities Corporation and the Energy and Chemical Workers Union Local 911, to implement an affirmative action program. The program was developed by a joint union/management affirmative action committee and is designed to address the employment opportunities of women, persons of Indian ancestry and persons with physical disabilities.

As of April 1984, SaskCOMP had a workforce which consisted of 163 employees. 113 or 69.3% were male, 50 or 30.7% were female, 2 or 2.1% were persons of Indian ancestry and 5 or 3.1% were persons with physical disabilities. A breakdown of the positions held by target group members indicated that most women (42%) were clustered in the clerical occupations and were underrepresented in the remaining occupational categories. Persons of Indian ancestry and persons with physical disabilities were underrepresented in all occupational categories.

The objective of SaskCOMP's affirmative action program is to develop a workforce which reflects the composition of the available labour pool. In order to fulfill this objective, SaskCOMP has identified goals for the recruitment, hiring and promotion for each target group. Over the next ten to fifteen years, SaskCOMP will be striving to produce a workforce which has a representation of 11.5% persons of Indian ancestry, 7.1% persons with physical disabilities and 39% women in each occupational category. In order to realize these goals, SaskCOMP has devised a formula which will be applied annually to calculate the number of hires which will be designated for the recruitment of target group members. Factors which will be taken into account when applying the formula are staff growth, staff turnover, educational qualifications required for the major occupational categories, availability of target group members and the present rate of participation of target group members in the workforce. This method represents a new and innovative approach in setting goals and timetables.

3. City of Regina

On December 11th, 1984 the Saskatchewan Human Rights Commission granted an extension to the interim approval given to the City of Regina in November, 1983. The City of Regina was granted an interim approval to recruit, hire and train seven (7) firefighters of Indian ancestry and four (4) bus operators of Indian ancestry. The original interim approval was granted to the City of Regina on the condition that a complete program for all three target groups be submitted to the Saskatchewan Human Rights Commission for approval by November 30, 1984.

In November 1984 the City provided the Commission with information which indicated that they were unable to comply with the time line specified in the condition. The City requested that their interim approval be extended for another year. After careful consideration the Commission granted an extension of the City's interim approval on the condition that a comprehensive program be submitted for approval to the Commission by November 30, 1985.

Exemptions

Section 48 of *The Saskatchewan Human Rights Code* allows the Commission or the Director to grant exemptions from any provision of the Code "where any person or class of persons is entitled to an exemption . . . under any provisions of this act" or "where the Commission . . . considers (an exemption) necessary and advisable."

The Code and regulations pursuant to the Code outline procedures for applying for an exemption and for the convening of a public hearing to determine whether the exemption should be granted.

The following exemption applications were considered by the Saskatchewan Human Rights Commission during the 1984 reporting year:

1. The Saskatchewan Police Commission

On May 18, 1984, the Saskatchewan Human Rights Commission issued a decision rejecting an application made by the Saskatchewan Police Commission requesting an exemption pursuant to Section 48 of *The Saskatchewan Human Rights Code*. The Police Commission applied for an exemption from the Code so that they could ask the date of birth of an applicant who applies for a position with a municipal police force within the Province of Saskatchewan and request a medical examination of an applicant for a position on a municipal police force prior to any interview taking place or any job offer being made.

In its application, the Police Commission indicated that asking the date of birth during the application procedure was necessary to determine whether an applicant is 18 years of age or over and for the purpose of a check on the applicant's criminal record. The Canadian Police Information Centre (CPIC) requires dates of birth for checks on criminal records in order to prevent any misidentification which might arise because of persons having the same name.

On February 22, 1984, the Saskatchewan Human Rights Commission convened to hear the application for the exemption. Submissions were presented by Mr. H. Joudrey, Executive Director of the Saskatchewan Police Commission, Police Chief Wes Stubbs of Prince Albert, Mel Graham of the Voice of the Handicapped and the staff of the Saskatchewan Human Rights Commission. Written submissions were also received from the Saskatchewan Federation of Labour, the Saskatchewan Police Federation, Disabled Persons Employment Service and the Weyburn City Policeman's Association.

The Saskatchewan Human Rights Commission concluded that the exemption was not necessary. The Commission stated that the Saskatchewan Police Commission can find out, by a properly drafted question, whether the applicant is 18 years of age and they can also ask the applicant whether he or she has a criminal record. It was pointed out that the Saskatchewan Police Commission or municipal police forces can advise an applicant that any misrepresentation of his or her criminal record may be grounds for disqualification. After an offer of employment has been made in writing, the employer can request date of birth and carry out the check through the Canadian Police Information Centre.

The evidence provided at the hearing indicated that of the 488 applicants in 1983, only two were rejected as a result of the CPIC check. The Commission noted that "this indicates that misrepresentation by individuals as to their criminal record is not a serious problem."

The Saskatchewan Human Rights Commission also denied the Police Commission's request that they be allowed to conduct medical examinations prior to making an offer of employment. In its decision the Commission said "the Saskatchewan Human Rights Commission has carefully considered the matter of when and in what circumstances medical examinations can lawfully be conducted. We find no reason to allow employers of police to conduct examinations in any different manner than any other employer. The Saskatchewan Mining Association exemption order of October 1982 allows appropriate medical examinations to be conducted for police officers after an offer of employment has been made in writing. Such an offer of employment can be made conditional on confirmation of the candidate's ability to perform the necessary job tasks. The existing order in no way requires an employer in the province to hire persons who cannot perform the job in question or lower their standards."

The Police Commission had argued that it was more convenient for employers of police to conduct medical examinations prior to offers of employment being made. The evidence given at the hearing indicated that only two of last year's applicants were rejected for medical reasons and the Human Rights Commission noted that two of the municipal forces were already complying with the terms of the Commission's existing exemption order regarding medical examinations.

In its decision the Commission concluded by saying, "The Saskatchewan Human Rights Commission is of the view that the existing law in the province allows the employers of police to recruit qualified officers and no exemptions are required."

2. Women In Need, Yorkton, Saskatchewan

The Director granted an exemption from Sections 19 and 16 of *The Saskatchewan Human Rights Code* to Working for Women of Saskatoon, Inc. on October 23, 1984. Working for Women provides programs designed to assist women to prepare for and find satisfactory work or training. The exemption allows this organization to advertise and employ only women and to provide services for women only. The exemption is a limited one and allows for discrimination on the basis of sex alone.

3. Environment Canada Planning

On March 8, 1984, Environment Canada Planning of the Federal Government applied for an exemption to implement the Environment 2000 Project. The project was designed to hire, on a preferential basis, persons who are between the age of 16 and 24 and who are 50 years and older. The project also intends to set specific goals, within this category of workers, to hire women, persons of Indian ancestry and persons with physical disabilities proportionate to their availability within the community. In its submission, Environment Canada provided the Commission with materials which documented the difficulties and hardships confronted by unemployed workers, both young and old. The submission also acknowledged that there are certain segments of the labour market who must contend with increased disadvantages in obtaining employment because of their race, sex, or disability.

On August 16, 1984 the Saskatchewan Human Rights Commission granted Environment Canada an exemption from Section 16(1), (2) and (3) of *The Saskatchewan Human Rights Code*. The exemption Order was granted in a very narrow fashion and did not exempt the applicant from any other provisions of Section 16. The exemption was in effect until August 31, 1984 at which time the project concluded.

4. Saskatchewan Mining Development Corporation — Bursary Program

The Saskatchewan Mining Development Corporation requested an exemption from Sections 12 and 13 of *The Saskatchewan Human Rights Code* in order to allow the Corporation to give preference in the granting of scholarships to persons of Indian ancestry. The Saskatchewan Mining Development Corporation wished to give preference to Native people in the mining industry because typically Native people have been employed in the lower skill areas. It is hoped that the availability of bursaries to Native people will enhance their educational attainment and hence their employment opportunities. The Director of the Saskatchewan Human Rights Commission granted the exemption for a one-year period.

5. Department of Social Services, Rehabilitation Services, Breakthrough Program

The Department of Social Services, Rehabilitation Services, requested an exemption from Section 16(1), (2), and (3) and Section 19 of *The Saskatchewan Human Rights Code* in order to implement a proposed employment demonstration project for physically disabled people. The requested exemption would enable employers participating in the Breakthrough Project to employ physically disabled persons only. An exemption would enable agencies which are participating in the Breakthrough program to receive, classify or dispose of and refer applications for employment on behalf of physically disabled persons only and would further allow employers to use the agencies that participate in the program and refer physically disabled persons specifically. A Section 19 exemption was requested in order to permit employers or agencies recruiting physically disabled persons to advertise for physically disabled workers and to inquire into the nature of the disabilities of such workers. The department proposed to develop employment initiatives to demonstrate the productive potential and capabilities of people who are physically disabled. The proposed length of the project is until March 31st, 1985.

In its decision dated July 6, 1984 the Saskatchewan Human Rights Commission allowed for an exemption from Section 16(1), (2), and (3) of *The Saskatchewan Human Rights Code* but denied the request for an exemption from Section 19 to allow the use of an application form that asks questions regarding physical disability.

Education and Research

Education Activities

The Saskatchewan Human Rights Code provides the Commission with a broad mandate to further equality and the recognition of rights through research and education programs. The Commission has the duty under Section 25 of the Code to:

a) forward the principle that every person is free and equal in dignity and rights without regard to his race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin;

b) promote an understanding and acceptance of, and compliance with, this Act;

c) develop and conduct educational programs designed to eliminate discriminatory practices related to the race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin of any person or class of persons.

d) disseminate information and promote understanding of the legal rights of residents of the province and conduct educational programs in that respect;

e) further the principle of the equality of opportunities for persons, and equality in the exercise of the legal rights of persons, regardless of their status;

f) conduct and encourage research by persons and associations actively engaged in the field of promoting human rights;

g) forward the principle that cultural diversity is a basic human right and fundamental human value.

In fulfilling its educational role, the Commission attempts to keep the public and affected groups informed of new developments in all areas.

The Commission's education activities, therefore, provide information on new developments in human rights, including legal provisions, law enforcement procedures, Board of Inquiry decisions in Saskatchewan and other jurisdictions, special programs, exemptions, accessibility, and many other issues. This information is disseminated through speaking engagements and meetings, conferences, workshops, media contacts, printed materials and newsletters.

During 1984 the Commission received and responded to 453 requests to send speakers to conferences, workshops, community meetings, school and university classes and training sessions (see Table VII). These requests came from professional associations, business organizations, members of consumer, community and advocacy groups, teachers, students, labour unions, staff associations, employers and social service agencies.

In addition, many students, teachers, lawyers and professional consultants contacted the Commission with requests for materials, case decisions, and general information to help them develop papers, courses, articles or theses on human rights issues.

The Commission publishes a newsletter approximately four times per year, which is distributed to 10,000 people in the Province.

Our staff has also prepared and distributed hundreds of pamphlets on all aspects of the Code (see Table VIII).

The Saskatchewan Human Rights Commission's Schools Newsletter "On Rights" continues to be published in response to Canada's international commitment, along with other members of the United Nations Educational, Scientific and Cultural Organization (UNESCO), to incorporate the teaching of human rights into school curricula by 1986. The newsletter is being circulated to all Grades 7 to 12 schools in Saskatchewan. Each edition of "On Rights" features an article on a human rights issue, along with classroom projects and exercises. It also includes a list of resource materials (books and audio-visual material).

The Commission staff have noted a marked increase in requests for information and workshops on the *Charter of Rights and Freedoms*. Part of the interest over the last year can be explained by the fact that Section 15, the equality section of the *Charter of Rights and Freedoms*, comes into effect in April, 1985.

Organizations and groups which work with persons with mental disabilities requested the Commission staff to conduct workshops on the possible implications of the Charter. The Director of Education was invited to participate as a leader in a workshop for the employees of the Rehabilitation Division of Social Services in Fort San. The workshop ran for two and one-half days and dealt with the rights of mentally disabled persons as protected under the *Canadian Charter of Rights and Freedoms*. Commission staff received invitations to conduct similar workshops from the Saskatchewan Association for the Mentally Retarded, "By Ourselves" (this is an organization representing ex-psychiatric patients), the volunteer workers for the SAMR and the staff of the North Park Centre in Prince Albert.

Educators are also interested in the *Charter of Rights and Freedoms* and its implications within the education system. During 1984 Commission staff spoke to the League of Educational Administrators, Directors and Superintendents (LEADS), the Regina Teacher's Convention, the Rosetown, Kindersley, Eston/Elrose Convention and the North Battleford Public School Convention. The staff were also invited to conduct workshops for the staff of the Saskatchewan Technical Institute and house parents of the School for the Deaf.

In April, the Director of Education acted as a resource person at the Annual 4-H Camp held in Camp Rayner. The theme of the two and one-half day 4-H Camp was "Human Rights." There were approximately 150 4-H members of high school age in attendance. Participants were provided with background information on human rights legislation and given the opportunity to explore the reasons for such legislation, to analyze how it can affect them in everyday life, and to consider ways of bringing about change in the field of human rights. The Commission staff appreciated the opportunity to work with so many students and considered it well worth their time.

From May 28 to May 30 Commission members and staff attended the annual conference of the Canadian Association of Statutory Human Rights Agencies (CASHRA) in Winnipeg. CASHRA's members are the statutory agencies in each Canadian jurisdiction which administer and enforce human rights laws. The education division participated in the conference by discussing the educational initiatives underway in Saskatchewan. The focus of the presentation was the work being done by the Saskatchewan Human Rights

Commission in incorporating human rights teaching within the education system.

The Director of Education was invited to act as a resource person for a school on Human Rights Law sponsored by the Canadian Labour Congress and the Canadian Human Rights Commission. The staff provided participants with information on *The Saskatchewan Human Rights Code*, with particular focus on affirmative action.

At the invitation of Arnold Tusa, Legislative Secretary to the Minister of Education, the Commission presented a brief to the Native Education Review Committee, outlining proposed changes needed within the education system in order to improve the educational opportunities of native people. The Commission proposed that a comprehensive affirmative action program be undertaken by each school board, which would include an affirmative action hiring process, a review of all policies and practices within schools, native representation within curriculum, in-service training on cross cultural issues for teachers and native representation at the school board level.

As a follow up to its proposal the Commission has set up public hearings in Regina and Prince Albert in order to receive feedback from the community on its proposal for a comprehensive affirmative action program. The hearings have been scheduled for February 1985.

The staff of the Commission provided a workshop for provincial government employees at the request of the Public Service Commission. The workshop dealt with specific employment issues such as employment application forms, affirmative action, reasonable accommodation, reasonable occupational qualification and sexual harassment.

In preparation for the proclamation of Section 15 of the *Charter of Rights and Freedoms*, the Commission sent out invitations to the Department of Education, the Saskatchewan Teacher's Federation, the Saskatchewan School Trustees Association and the Public Legal Education Association, inviting them to work with the Commission on providing an educational forum in which to discuss the impact of the *Charter of Rights and Freedoms* on the education system. It is the Commission's hope that these organizations will all be able to work together throughout 1985 and explore the best possible means of providing information on the Charter to teachers, school boards and others involved in education.

The Commission has been concerned about racism and racial discrimination in this province. In working towards improving race relations a Commission staff member has been involved in the Indian and Native Police Committee in Regina. Other staff have participated in conferences and on panels dealing with race relations and community awareness.

Accessibility Standard

The Saskatchewan Human Rights Code states that physically disabled persons have the right to equal access and cannot be discriminated against in areas such as employment, housing, public accommodation and education. However, physically disabled individuals are often denied their right to equal opportunity and access because of architectural barriers. In order to eliminate these barriers in the future the Commission adopted the "Accessibility Standard" on August 14, 1980.

During 1984 the Commission received 128 sets of building plans for review. A large number of the plans submitted to us were plans for new schools or additions and/or alterations to existing schools. As of December 1984 the Department of Education has assumed responsibility for reviewing school plans to ensure that they conform to the "Accessibility Standard."

The Department of Supply and Services has also submitted a number of plans for review. Other plans are sent to the Commission for comments, on a voluntary basis, by architects throughout the province.

The Commission staff is also called upon to evaluate existing buildings in light of the provisions outlined in the Standard and submit their recommendations on the necessary changes required to make the buildings accessible.

For the past three years the Saskatchewan Human Rights Commission has urged the provincial government to incorporate accessibility standards under a Provincial Building Code. On December 7, 1983 the provincial government introduced Bill 19 (An Act Respecting Building and Accessibility Standards and the Inspection of Buildings) to the Legislative Assembly. The Minister of Labour held a public hearing in Saskatoon on January 10, 1984 in order to allow the public an opportunity to express its opinion of Bill 19. The Commission presented a brief at the public hearing and informed the Minister of Labour that Bill 19 may be in conflict with the provisions of *The Saskatchewan Human Rights Code* since the requirements as outlined in the Bill were insufficient and limited the rights of physically disabled persons as protected under *The Saskatchewan Human Rights Code*. The Code guarantees disabled people equal opportunity and non-discriminatory treatment. This guarantee requires equality of access to the built environment and all opportunities and services carried on there. The

Commission recommended specific changes to Bill 19 so that it would parallel the rights persons with physical disabilities have enshrined in *The Saskatchewan Human Rights Code* and the *Charter of Rights and Freedoms*.

During the months of January, February and March the Commission and some of its staff met with 12 cabinet ministers, the NDP caucus, and the Premier of Saskatchewan to discuss the shortcomings of Bill 19. Bill 19 was amended and reintroduced into the Legislature in May 1984. Subsequent to the passage of the Bill, which is yet to be proclaimed, the Department of Labour set up a committee to finalize the drafted Accessibility Regulations. Ronald J. Kruzeniski, Chief Commissioner of the Saskatchewan Human Rights Commission, was appointed to the committee. The work of the committee is nearing completion. We look forward to the proclamation and enactment of *An Act Respecting Building and Accessibility Standards and the Inspection of Buildings* and its Regulations.

Resource Centre

Our Commission office in Saskatoon has a Resource Centre which is available for public use.

Our collection includes approximately 900 books, 330 serial publications of which 300 are current, an extensive vertical file collection and various audio-visual material. The Resource Centre is used by university and high school students, teachers, professors, lawyers and the general public.

Our Resource Centre also has on hand the following law reporters:

- Affirmative Action Compliance Manual for Federal Contractors
- Canadian Charter of Rights and Freedoms
- Canadian Charter of Rights Annotated
- Canadian Human Rights Reporter
- Canadian Labour Law Reporter
- Canadian Native Law Reporter
- Disability Law Reporter
- Employment Practices Guide
- Employment and Training Reporter
- Equal Opportunity in Housing
- European Convention on Human Rights Decisions
- European Human Rights Reports
- Fair Employment Practice Service
- Human Rights Law Journal
- Supreme Court of Canada Decisions

Table I

Summary of Informal Complaints by Grounds and Category

Category	Grounds Application Forms	Sex Sexual Harass.	 Other	 Colour	Race Native Ancestry	 Other	 Religion*	 Nationality/ Citizenship	 Marital Status	 Age	Ancestry** Native	 Other	Physical Disability Access	 Other	 Other	 Total	 Percent
Accommodation, Services and Facilities		1	10		14	1		1	1	2		1	2	9		42	14.5
Notices/Publications			2		1			1								4	1.5
Employment		44	33	1	9	7	3	5	2	16		1		30		151	51.5
Employment Advertisements			1											1		2	.5
Trade Unions														1		1	.25
Application Forms/Interviews	36															36	12.5
Bill of Rights															27	27	9
Right to Education					1		3									7	2.5
Right to Engage in Occupations										1				3		2	.5
Property/Housing					8	2			6	1	2			1		19	6.5
Membership in Associations																	
Reprisal															1	1	.25
Contracts					1									1		2	.5
Total	36	45	46	1	34	10	6	7	9	20	2	2	2	46	28	294	
Percent	12.5	15	16	.5	11.5	3.5	2	2.5	3	6.5	.5	.5	.5	16	9.5		100

* Includes "creed"

** Includes "place of origin"

Table II

Disposition of Informal Complaints

Disposition	Number	Percent
Settled	39	13
Withdrawn	34	11.5
No Reasonable Grounds	27	9
Transferred to Formal Inquiry	101	34.5
Total	201	68
Under Investigation	93	32
Grand Total	294	100

Table III

Summary of Formal Complaints by Grounds and Category

Category	Sex		Colour	Race		Religion*	Nationality/ Citizenship	Marital Status	Age	Ancestry **		Physical Disability		Other	Total	Percent
	Sexual Harass.	Other		Native Ancestry	Other					Native	Other	Access	Other			
Accommodation, Services and Facilities	1	2		7				7	1		1	5	12		36	14.5
Notices/Publications		4													4	1.5
Employment	54	37		6	9	4	1	2	16				30		159	65
Employment Advertisements		1													1	.5
Trade Unions																
Application Forms/Interviews																
Bill of Rights														11	11	4.5
Right to Education				6								1			7	3
Right to Engage in Occupations								1							1	.5
Property/Housing		1		9	3		1	9		1			1		25	10
Membership in Associations																
Reprisal														1	1	.5
Contracts																
Other																
Total	55	45		28	12	4	2	19	17	1	1	6	43	12	245	
Percent	22	18		11	5	2	1	8	7	.5	.5	2.5	17.5	5		100

* Includes "creed"

* * Includes "place of origin"

Table IV

Disposition of Formal Complaints

Disposition	Number	Percent
Withdrawn	25	10
No Probable Cause	36	14.5
Probable Cause Found	64	25.5
Total	125	50
Under Investigation	126	50
Grand Total	251	100

Table V

Disposition of Probable Cause Complaints

Disposition	Number	Percent
Settled	14	21
Withdrawn	3	5
Board of Inquiry Directed	7	11
Total	24	37.5
Undisposed	40	62.5
Grand Total	64	100

Table VI

Boards of Inquiry

Number, Category and Grounds of Complaints in which Boards of Inquiry Were Directed by the SHRC in 1984

	Grounds			
Category	Sexual Harass.	Marital Status	Other	Total
Employment	5	1		6
Bill of Rights — Freedom of Speech			1	1
Total	5	1	1	7

The Saskatchewan Human Rights Commission directed a Board of Inquiry in all of the above 7 complaints.

Table VII

Education Statistics

Type of Activity	Number
Speeches	56
Community Consultations	208
Meetings	50
Conferences and Workshops	65
Literature Displays	7
Radio, Television and Newspaper Interviews	67
Total	453

Table VIII

Requests For Literature

	Number of Requests	Number Given
Written	946	3,808
Personal	14,716	18,974
Telephone	1,648	10,105
Conference Displays	822	3,593
Total	18,136	36,480

Table IX

AFFIRMATIVE ACTION PROGRAMS IN SASKATCHEWAN

As of December 31st, 1984

Employment	Approval Date	Number of Employees
SASKATCHEWAN HUMAN RIGHTS COMMISSION	January 16, 1980	28
ST. ANDREW'S COLLEGE	April 10, 1981	8
*THE CO-OPERATORS	February 5, 1982	700
SASKATCHEWAN OIL AND GAS CORPORATION (SASK OIL)	May 27, 1982	260
SASKATCHEWAN TELECOMMUNICATIONS	October 29, 1982	4,536
FLIN FLON MINES	November 24, 1983	45
*CITY OF REGINA	November 24, 1983	2,039
SASKATCHEWAN GOVERNMENT INSURANCE CORPORATION	February 16, 1984	1,342
SASKATCHEWAN COMPUTER UTILITY CORPORATION (SASKCOMP)	December 19, 1984	163

Training and Education	Approval Date
GABRIEL DUMONT INSTITUTE OF NATIVE STUDIES AND APPLIED RESEARCH; Saskatchewan Urban Native Teacher Education Program (SUNTEP)	August 5, 1980
SASKATCHEWAN PIPING INDUSTRY JOINT TRAINING BOARD	June 9, 1981
NORTHERN LIGHTS SCHOOL DIVISION	September 21, 1981
REGINA PLAINS COMMUNITY COLLEGE; Pre-Trades Training Program for Women	October 29, 1981
PRINCE ALBERT NATONUM COMMUNITY COLLEGE; Pre-Employment Trades Exploration for Women	March 30, 1982
MOOSE JAW COTEAU RANGE COMMUNITY COLLEGE; Pre-Trades Training Program for Women	February 24, 1983
GABRIEL DUMONT INSTITUTE OF NATIVE STUDIES AND APPLIED RESEARCH; Human Resource Development Training Program, Native Studies Instructors Program, and Native Recreational Technology Program	September 16, 1983
REGINA PLAINS COMMUNITY COLLEGE; Pre-Technology Program for Women	November 7, 1983

Housing	Approval Date
SASKATCHEWAN HOUSING CORPORATION	February 5, 1982

*Granted interim approval pending development of a full program addressing all three target groups.

List of Saskatchewan Human Rights Commission Staff

(as of December, 1984)

May Barr
Jan Cadman
Pat Cook
Laurena Daniels
Debra Fink
Donalda Ford
Mona Frederickson
Norma Green
Guy Herriges
Judy Kostyshyn
Genevieve Leslie
Bev MacSorley
Caryl MacKenzie
Robin McMillan
Yvonne Peters
Wm. Rafoss
Karen Ross
June Vargo
Sandy Walbaum
Theresa Walker
Ailsa Watkinson
Wanda Wiegers

List of Human Rights Commission Publications

1. The Saskatchewan Human Rights Code and Regulations
2. Pamphlets and Brochures:
   - Saskatchewan Human Rights Commission — Information Kit
   - Doing What's Right: The Saskatchewan Human Rights Code
   - Getting About: Rights of the Physically Disabled
   - Finding a Home: Landlord and Realtor Responsibilities
   - Rights on the Job: Employer's Guide
   - Application Forms and Interview Guide: A Guideline for Employers and Job Applicants
   - You've Filed a Complaint: Now What Happens?
   - Sexual Harassment
   - Arbitrary Arrest and Detention
3. Saskatchewan Human Rights Commission Newsletters:
   - Compulsory Retirement: Elements of the Debate
   - Sexual Harassment: Taking a Stand
   - The KKK: An Editorial Statement
   - Making Saskatchewan Accessible
   - The Education System and Human Rights
   - Saskatchewan Human Rights Commission Releases Interpretive Document on Pensions, Employee Benefits and Insurance
   - Sexual Harassment: New Developments and Interpretations
   - Independence for Human Rights Commissions: An Idea Whose Time Has Come
   - Canada's Constitution and Charter of Rights and Freedoms
   - Aboriginal Peoples of Canada and the Constitutional Process: The Task Ahead
   - Affirmative Action and Human Rights in the 1980s
   - The 35th Anniversary of the Universal Declaration of Human Rights: A Time to Celebrate
   - Arbitrary Arrest and Detention
   - Indian and Metis Self-Government in Canada
   - Affirmative Action: A New Direction For Schools
   - Affirmative Action News No. 1
   - Affirmative Action News No. 2
4. "On Rights," Saskatchewan Human Rights Commission Schools Newsletter
   - Volume 1, No. 1 — An Introduction to Human Rights
   - Volume 1, No. 2 — The Canadian Constitution and the Charter of Rights and Freedoms: A History of Civil Liberties in Canada
5. Other Materials:
   - Accessibility Standard
   - A Manual on the Charter of Rights and Freedoms
   - Human Rights and Benefits in the '80s: An Interpretation of the Saskatchewan Human Rights Code as it Applies to Pensions, Employee Benefits and Insurance
   - Steps for Developing an Affirmative Action Program
   - Affirmative Action Legal Provisions
   - *Affirmative Action: A Case Book of Legislation and Affirmative Action Programs in Saskatchewan
   - A Pictorial History of the Metis and Non-Status Indian in Saskatchewan
   - *TASC Workshop on Sexism
   - *TASC Workshop on Racism
   - *TASC Workshop on Handicapism
   - *Prejudice in Social Studies Textbooks along with supplement
   - *Sex Bias in Primary Readers
   - Saskatchewan Human Rights Commission Affirmative Action Decisions
   - Saskatchewan Human Rights Commission Exemption Orders
   - Saskatchewan Human Rights Commission Equal Pay Decisions
   - Saskatchewan Human Rights Commission Annual Reports 1981, 1982 and 1983
6. Posters
   - *Opportunities are Everyone's Right

List of Other Publications Distributed by the Commission

1. Human Rights Saskatchewan — Public Legal Education Association of Saskatchewan Publication
2. Dick and Jane as Victims: Sex Stereotyping in Children's Readers — Women and Words and Images Publication
3. The Canadian Constitution, 1981

The above publications are available in print or on cassette tape, except those marked with an asterisk (which are available in print only). These publications are available free of charge by contacting the nearest Commission office.

Canadian Human Rights Reporter — Decisions

Decision 357	Saskatchewan Government Insurance Co. (Saskatchewan Human Rights Commission / affirmative action)	D/2059
Decision 360	Saskatchewan Human Rights Commission v. Engineering Students' Society et al. (Saskatchewan Board of Inquiry / publication / sex)	D/2074
Decision 373	City of Moose Jaw and Moose Jaw Firefighters Association, Local 553 v. Roy Day (Saskatchewan Court of Queen's Bench / employment / age)	D/2205
Decision 374	Len Craig v. City of Saskatoon and Saskatoon Professional Fire Fighters Union, Local 80 (Saskatchewan Board of Inquiry / employment / age)	D/2209
Decision 381	Cheryl Sandiford v. Base Communications Ltd. (Saskatchewan Board of Inquiry / employment / disability)	D/2237
Decision 382	Charles Wagamese v. Ruth Genest (Saskatchewan Board of Inquiry / housing / race)	D/2240
Decision 395	Saskatchewan Human Rights Commission and Saskatchewan Police Commission (Saskatchewan Human Rights Commission Decision / exemption)	D/2317
Decision 400	Claudette Phillips (Auger) v. John Hermiz (Saskatchewan Board of Inquiry / employment / sexual harassment)	D/2450

CANADIAN HUMAN RIGHTS REPORTER

Volume 5, Decision 357 | Paragraphs 17515 - 17559 | April, 1984

SASKATCHEWAN / AFFIRMATIVE ACTION
Saskatchewan Government Insurance Corporation

Saskatchewan Human Rights Commission Decision
under the
SASKATCHEWAN HUMAN RIGHTS CODE

Saskatchewan Government Insurance Corporation
and
Saskatchewan Insurance Office of Professional Employees Union Local 397 of the Office Professional Employees International Union (OPEIU)
Applicants

— and —

Disabled Person's Employment Service
(Myron Gulka-teichko and Terry Folds)

Saskatchewan Co-ordinating Council on Social Planning
(Bob Ryan)

Saskatchewan Action Committee on the Status of Women
(Janice Kell)

Services for Hearing Impaired Persons Inc.
(Gordon Ryal)

Saskatchewan Voice of the Handicapped
(Mel Graham)

Saskatchewan Federation of Labour
(Ron Fisher and Barb Makeechak)

Saskatchewan Native Women's Association
(Leona Blondeau)

Staff of the Saskatchewan Human Rights Commission
(Yvonne Peters)
Intervenors

Date:	February 16, 1984
Place:	Regina, Saskatchewan
Before:	Ron Kruzeniski, Theresa Holitzki, Jack Sharp, Jan Kernaghan, Kayla Hock, and Helen Hnatyshyn

Summary: *The Saskatchewan Human Rights Commission approves an affirmative action plan submitted by the Saskatchewan Government Insurance Corporation and Local 397 of the Office Professional Employees International Union. The program is addressed to three target groups, women, persons of Indian ancestry, and persons with physical disabilities. Goals and timetables are established for increasing the representation of members of these groups.*

Approval is granted pursuant to Section 47 of the Saskatchewan Human Rights Code, which provides that nothing done in accordance with an approved program contravenes any other provision of the Code.

17515 On November 10, 1983, Mr. R.A. Warren, Director of Human Resources applied to the Saskatchewan Human Rights Commission for approval pursuant to Section 47 of *The Saskatchewan Human Rights Code* for an Affirmative Action program developed by the Saskatchewan Government Insurance Corporation (SGI). In accordance with Regulation 32 of *The Saskatchewan Human Rights Code*, Mr. Warren also requested that SGI's application for approval be considered by way of oral hearing. Twenty-one interested parties were notified by the Commission that the oral hearing would be taking place on January 30, 1984 in the City of Regina. Advertisements publicizing the oral hearing were placed in the following newspapers: The Regina Leader Post, The Saskatoon Star Phoenix, The Prince Albert Daily Herald, The Moose Jaw Times Herald and The North Battleford News Optimist.

17516 On April 9, 1980, at the conclusion of a rule making process which entailed public hearings the Saskatchewan Human Rights Commission adopted a set of proposed regulations governing the approval of Affirmative Action programs. (See Appendix A) SGI's written application and oral presentation falls within this analytical framework. Reasons for this Decision will now be set down within these guidelines which we hereby incorporate by reference into this Decision.

APPLICATION OF PROPOSED AFFIRMATIVE ACTION REGULATIONS

17517 Regulation 50

> (c) "Sponsor Organization" includes a "person" as defined by Section 2(m) of the Act, and a Board of Education, a school or institution as defined in *The Universities Commission Act*, or other institution or place of learning, vocational training, or apprenticeship, or any institution, organization, association, business or enterprise, or any institution, organization, association, business or enterprise which provides funds to other institutions, businesses or enterprises;

17518 The Saskatchewan Government Insurance, a corporaration duly incorporated under the Saskatchewan Government Insurance Act 1980 Chapter S 19.1 of The Statutes of Saskatchewan 1979-1980 and the Saskatchewan Insurance Office and Professional Employees Union Local 397 of the Office and Professional Employees International Union, is the sponsor organization by virtue of being a business or enterprise.

Regulation 50

> (d) "Target Groups" means persons of Indian ancestry, persons with physical disabilities, and women;

17519 In this program, the employment opportunities of women, persons of Indian ancestry and persons with physical disabilities are addressed.

Regulation 52

> In addition to any of the protected groups which may be designated by the sponsor organization for inclusion in a

> special program, the three target groups shall be included, but the Commission may give conditional or full approval to a special program that does not include one or more of the target groups if one or more of the following conditions exists.

17520 The sponsor organization is seeking full approval to implement an Affirmative Action program which will include women, persons of Indian ancestry and persons with physical disabilities and will be applicable to all departments, divisions and branch offices.

Regulation 53:

> A special program shall include the following:
>
> (a) Analysis, as follows:
>
> (i) "Sponsor Organization Analysis": an analysis of the representation of members of the target groups, and other protected groups designated by the sponsor organization, in all sectors, units, groupings, classifications, and levels in the sponsor organization;

17521 It should be noted that in February 1983 SGI was forced to reduce its workforce. Consequently, 77 in-scope employees and 33 management employees were laid off. In April 1983 an analysis was conducted to determine the impact of the lay offs on target group members. The results were as follows:

IN-SCOPE EMPLOYEES

Total Lay Offs		77
Male	38	
Female	36	
Persons of Indian Ancestry	3	
	77	77

MANAGEMENT EMPLOYEES

Total Lay Offs		33
Male	27	
Female (1 which was of Indian Ancestry)	6	
	33	33

WORKFORCE ANALYSIS

17522 The following analysis reflects SGI's workforce by actual numbers and percentages of male, female, native and disabled employees at all occupation levels, divisions and salary levels. The data reflects the Corporation's workforce as of March 31, 1983. The workforce data is compared with provincial target group populations and illustrates the corporate workforce participation rates. SGI has also filed with the Saskatchewan Human Rights Commission a detailed workforce analysis by Departments and Branch Offices.

In-Scope Employees

17523 There are 96 classification specifications within the scope of the OPEU at SGI. These specifications represent the professional, technical, trades, clerical and labour categories. There are 1163 employees in these occupational categories, of which 606 are female staff. Females represent 52% of the in-scope workforce, of which 83.5% are in the clerical/support categories.

17524 There are 11 employees of Indian ancestry who are in-scope. They are represented in the technical, clerical/support and labour categories.

17525 There are 30 employees with physical disabilities who are in-scope. They are represented in the professional, technical, trades, clerical/support and labour categories.

Out-of-Scope Employees

17526 There are 179 management employees out-of-scope of the OPEU, at SGI, of which 44 (25%) positions are held by female employees. Of the 44 female management employees, 13 or 7% perform secretarial functions and 31 or 18% are in supervisory or professional capacities.

17527 There are 3 management employees of Indian ancestry. These employees hold management positions at the first level.

17528 There are 2 management employees with physical disabilities. Both of these employees occupy positions at the first level.

Regulation 53

> (ii) "Community Analysis": an analysis of the representation of members of the target groups, and other protected groups designated by the sponsor organization, in the

Chart I — SGI Workforce
(as of March 31, 1983)

Workforce	Total #	Total %	Male #	Male %	Female #	Female %	Target Group Native #	Target Group Native %	Disabled #	Disabled %	Salary Ranges $
Executive	6	(.5)	6	(100.0)	0		0		0		
Managerial/Supervisory	173	(13.0)	124	(72.0)	44	(25.0)	3	(2.0)	2	(1.0)	1800-4798
Professional	71	(5.0)	37	(52.0)	31	(44.0)	0		3	(4.0)	1900-3354
Technical	383	(28.5)	281	(73.0)	89	(23.0)	3	(1.0)	10	(3.0)	1573-3098
Trades	51	(4.0)	47	(92.0)	1	(2.0)	1	(2.0)	2	(4.0)	1788-2524
Clerical/Support	561	(42.0)	78	(14.0)	468	(83.5)	3	(0.5)	12	(2.0)	1274-2309
Labour	97	(7.0)	89	(92.0)	1	(1.0)	4	(4.0)	3	(3.0)	1164-1909
Total	1342	(100.0)	662	(49.0)	634	(47.0)	14	(1.0)	32	(3.0)	

population defined by qualification, eligibility, or geography, from which the sponsor may reasonably be expected to draw its employees, students, tenants, clients, customers or members;

17529 The external workforce data of target group members in Saskatchewan was provided by the Saskatchewan Human Rights Commission. These figures indicate approximately 7.1% of the population between the ages of 15 and 64 are persons with physical disabilities, and 11.5% of the working age population are persons of Indian ancestry. Female participation in the labour force represents 39% of all workers but does not represent 39% in all occupational categories. In the forthcoming section, a comparative analysis indicates the representation of target groups within SGI's workforce and the percentage figures for under representation or concentration through the application of community analysis statistics (39% women, 11.5% persons of Indian ancestry, 7.1% persons with physical disabilities).

(iii) "Participation Analysis": an identification of all sectors, units, groupings, classifications, and levels in the sponsor organization in which members of the target or protected groups are under represented.

Women

17530 SGI has a female representation of 652 or 49% within a workforce of 1342 employees. The workforce data shown in Chart 3 clearly indicates that women are concentrated in the clerical/support categories and are under represented in the management, technical and trade categories.

Persons of Indian Ancestry

17531 The workforce analysis for SGI illustrates that there are fourteen (14) employees of Indian ancestry within a total workforce of 1342. Three (3) of these employees are in the management category and eleven (11) are in the technical, trades, clerical/support and labour groups. This indicates that persons of Indian ancestry are under represented within the present workforce by approximately 10.5% or 140 employees (see Chart 2).

Persons with Physical Disabilities

17532 SGI currently employs thirty-two (32) people with physical disabilities; two (2) in the management category,

Chart II — SGI Participation Analysis
(SGI Workforce and Community Workforce Comparisons)

Occupational Category	Total		Female Representation		Native Representation		Disabled Representation	
	#	%	Actual	Target 39%	Actual	Target (11.5%)	Actual	Target (7.1%)
Executive	6	0.5	0	2	0	1	0	1
Managerial/Supervisory	173	13.0	44*	68	3	20	2	12
Professional	71	5.0	31	31	0	8	3	5
Technical	383	28.5	89	149	3	44	10	27
Trades	51	4.0	1	20	1	6	2	4
Clerical/Support	561	42.0	468	326	3	65	12	40
Labour	97	7.0	1	38	4	11	3	7
Total	1342	100.0	634	634	14	154	32	95

* 13 are out-of-scope secretarial staff.

Chart III — Occupational Distribution for Men and Women

Total Male Workforce	Categories	Male #	Male %	Total Female Workforce	Categories	Female #	Female %
690	Executive	6	(0.8)	652	Executive	0	(.0)
690	Management	127	(18.4)	652	Management	46	(7.1)
690	Professional	38	(5.5)	652	Professional	33	(5.1)
690	Technical	292	(42.3)	652	Technical	91	(14.0)
690	Trades	50	(7.2)	652	Trades	1	(0.1)
690	Clerical	81	(11.7)	652	Clerical	480	(73.6)
690	Labour	96	(13.9)	652	Labour	1	(0.1)
Total		690	(100.0)			652	(100.0)

three (3) in the professional category, ten (10) in the technical category, two (2) in the trades category, twelve (12) in the clerical/support category and three (3) in the labour category. This reveals an under representation of approximately 5.1% or 63 physically disabled persons within the present workforce (see Chart 2).

Regulation 53

(b) "Goals and Timetables", as follows:

(i) Goals, which shall be expressed in numbers and percentages, for increasing the representation of the target or protected groups that are included in the program, in those sectors, units, groupings, classifications and levels where under representation has been identified, and timetables, both short and long term, for meeting the established goals;

(ii) Goals and timetables, for the achievement thereof, shall be set separately for each target or protected group that is included in the program, and for each sector, unit, grouping, classification and level where under representation has been identified pertaining to that group;

(iii) Goals shall be based on the extent of under representation identified and on the availability of members of the target or protected groups who are qualified, or who can become qualified through reasonable efforts on the part of the sponsor organization, or who are eligible or who can become eligible through reasonable efforts on the part of the sponsor organization, for positions or places within the sponsor organization;

(iv) Timetables, for the achievement of each goal, shall be based on the anticipated increase and decrease in the number of people within the sponsor organization, and the anticipated turnover of people within the sponsor organization;

(v) Goals and timetable shall be reasonable and flexible.

17533 SGI has identified a 20 year time frame in which to attain a workforce which is reflective of the current working aged target group population. By the year 2004, SGI hopes to have a 39% representation of women in all occupational categories, 11.5% employees of Indian ancestry and 7.1% employees with physical disabilities in its workforce. Fluctuations in the workforce and the need for ongoing work to ensure the incorporation of Affirmative Action principles into the work environment, are factors which were taken into account when determining appropriate goals and timetables.

17534 Established numerical goals are based on projected expansion or contraction, projected vacancies, attrition, turnover, retirement and the availability of qualified or qualifiable target group members. 1983-84 external hiring will be limited due to recent layoffs and impending technological change. Specific goals and timetables are illustrated in Chart IV.

Regulation 53

(c) "Program Elements", as follows:

(i) Program elements designed to prevent, eliminate, or reduce disadvantages that are likely to be suffered by, or are suffered by, members of the target or protected groups that are included in the program, by improving opportunities for such groups;

(ii) Program elements designed specifically to address and remedy the underrepresentation of target or protected groups that are included in the program as identified pursuant to section 53(a)(i) of these regulations.

FUTURE ACTIVITIES

1. Employment Systems Review

17535 The Affirmative Action Committee intends to review the entire employment system step by step to identify the causes of underrepresentation and/or overconcentration of the target groups. The review will encompass the following areas:

A. The recruitment process and personnal and departmental procedures.
B. Selection standards and procedures.
C. Mobility systems, job progression, transfer, promotions, seniority, training.
D. Training and development.

Chart IV — Affirmative Action Goals and Timetables by Target Group
(20 Year Plan)

Target Group	Current 1983	Short Term	Mid Term	Long Term	#	(%)
Total Employees	1342	1342	1342	1342		
Total Female Employees	652	652	652	652		
(Underrepresented Categories:)						
Executive	0	1	1	0	2	(39.0)
Management (excluding secretaries)	33	5	10	20	68	(39.0)
Technical	89	9	18	33	149	(39.0)
Trades	1	3	6	10	20	(39.0)
Labour	1	6	11	20	38	(39.0)
Native Employees	14	25% of all new hires			154	(11.5)
Disabled Employees	32	10% of all new hires			95	(7.1)

Note: This chart will be revised whenever changes occur in SGI's workforce (1342) and in the target group working age population figures: 39% 11.5% and 7.1%.

E. Wage and salary structure.
F. Benefits and conditions of employment.
G. Layoffs, recall, terminations, disciplinary action.
H. Union contract provisions affecting these areas.

2. Classification Review

17536 During the 1981 negotiations, a letter of understanding was signed by management and the union to review the job classifications within the scope of the union. The main purpose of the review will be to determine the realistic minimum requirements for each classification and the positions in each classification. Areas of concern which will be addressed include: formal education, knowledge, skills and abilities, equivalences (where appropriate) and dead end jobs. The Affirmative Action Committee has filed a set of guidelines with the Saskatchewan Human Rights Commission which will be used in these classifications reviews. A report containing the results of this review will be filed with the Saskatchewan Human Rights Commission upon its completion.

Recruitment

17537 **1. Internal**

a) The Human Resources Department will assist other departments in recruitment and placement of qualified candidates for both management and in-scope vacancies.

b) The Human Resources Department is responsible for establishing and maintaining an applicant flow and inventory system. This system will maintain information on target group applicants, resumes and applications documents, referral source, date of application and position applied for. Prior to the filling of any positions, the applicant inventory will be consulted for potential candidates. A section in the personnel requisition form will be added to document the consultation with the application inventory system. A report identifying hiring, promotions, terminations, lay offs, technological change, and abolished positions, will be compiled according to target groups, departments and job classifications on a monthly basis and submitted to the Affirmative Action Committee for monitoring purposes.

17538 **2. External**

a) The Human Resources Department will be responsible for developing an active outreach program. An active relationship will be maintained with all organizations and institutions representing target group members. Outreach activities will include career days, advertising in relevant media and placing job orders with organizations and agencies involved in the placement of target group members.

b) An information service will be established for high schools, vocational technical institutes and universities, concerning job opportunities with SGI and required job qualifications. This will involve participation in career days and presentations to students, particularly members of the target groups.

c) Following the approval of this plan, SGI intends to incorporate a voluntary self-declaration form for target group members into their employment application form. Where necessary, SGI will assist applicants in preparing for interviews and completing application forms.

Orientation

17539 1. SGI will provide an employee orientation program designed to introduce new employees to the corporation's work environment. The content of this program will focus on:
a) Benefits and compensation;
b) Promotional opportunities;
c) A basic orientation which addresses employee adjustment to the work environment;
d) A presentation by the union for each session involving in-scope employees.

It is hoped that a program of this nature will assist in the retention of target group employees.

2. In addition, management involved in the employment process such as recruitment, interviews, selection, replacement, promotion, and training, will be given instruction in the use of objective job related standards in the selection, placement and training of all employees.

Human Resources Planning

17540 1. A comprehensive human resources plan is currently being developed. This plan will include the following components.
a) Development and implementation of a human resources inventory system.
b) Development of a method to identify employee potential or talent other than through the performance appraisal approach.
c) Corporate training needs assessment.
d) Identification and delivery of appropriate in-house training.
e) Evaluation and co-ordination of the overall corporate training activities.

Career Counselling

17541 1. Career counselling services will be made available to SGI employees and in particular to members of the target groups.

Selection Procedures

17542 1. Training will be provided to staff interviewers regarding non-job related requirements and their impact on potential candidates.

2. Any current or future employment tests which cannot be job validated will be eliminated. A list of the employment tests currently being used by SGI has been filed with the Saskatchewan Human Rights Commission.

Technological Change

17543 1. When technological change forces a displacement of employees, priority will be given to retain these employees for occupational categories where they are under represented.

Employee Assistance Program

17544 1. An employee assistance program has been incorporated into the work environment at SGI. The program specifically deals with employee alcohol and drug abuse problems. Consideration will be given to expanding the program to accommodate areas such as financial counselling, marital counselling and stress management. A copy of the guidelines and procedures used to administer the employee assistance program has been filed with the Saskatchewan Human Rights Commission.

Day Care

17545 1. While SGI recognizes that the lack of adequate day care may create difficulties and hardships for target group employees, it is felt that a study is required to determine the need and feasibility of providing day care during working hours.

Affirmative Action Awareness

17546 1. Management and union will provide awareness programs for SGI employees. These programs will include information and education about Affirmative Action, target group members and SGI's Affirmative Action Plan. In preparing awareness programs, an information kit and other educational aids will be developed by the Human Resources Department.

Sexual Harassment Policy

17547 1. The Corporation recognizes the importance of maintaining a work environment that is free of sexual harassment of a physical or verbal nature. A sexual harassment policy has been approved by the SGI Board of Directors and filed with the Saskatchewan Human Rights Commission.

Women

17548 1. Emphasis will be placed on recruiting women both internally and externally for employment in the under represented occupational categories.

A management development program will be offered for women already in management and for those women generally interested in the area. The program will include career awareness, skills assessment and identification of specific training and educational needs.

Persons of Indian Ancestry

17549 1. Programs of cultural awareness will be offered to SGI Management personnel involved in the recruitment and selection of staff, particularly for first line supervisory personnel.

2. A co-op work study program will be developed in conjunction with the Saskatchewan Indian Federated College, to complement their program of Indian administration and management. Native students, participating in the program, could spend alternative semesters off campus engaged in paid employment that closely follows and enhances their academic studies.

3. SGI will make available scholarships to qualified individuals to encourage native students to pursue relevant university or post-secondary studies. Administrative details are currently being worked out.

4. SGI will work jointly with governmental agencies and organizations to develop training programs for people of Indian native ancestry to enable them to meet the minimum job qualifications. The Native Services Branch of Advanced Education and Manpower, is an example of an agency which will be approached.

5. Employment referral agencies involved in the job placement of persons of native ancestry, will be notified when vacancies occur at SGI.

Persons with Physical Disabilities

17550 1. Organizations representing persons with physical disabilities will be informed of available job opportunities. As well, these organizations will be used to obtain information regarding employment support systems and technical aids.

2. A physical demands analysis will be conducted in all entry level positions documenting the physical and environmental requirements of these jobs. Analysis of positions other than entry level positions, will be carried out as the need arises.

3. Training and pre-employment training will be carried out in conjunction with organizations knowledgeable in the employment needs of persons with disabilities.

4. Educational awareness programs will be conducted concerning the employment of persons with physical disabilities. Topics may include myths and facts concerning employment of persons with disabilities, accessibility to the workplace and job accommodation.

5. Scholarships will be made available to disabled students pursuing studies in the insurance, finance, computer science, human resources, administration and law disciplines.

6. The corporation recognizes that the major employment barrier for most disabled people is the physical inaccessibility of the workplace. Therefore, the corporation will negotiate or provide the financial resources necessary to make renovations which will enable reasonable access and accommodation to persons with physical disabilities. An accessibility study is currently being conducted for all SGI buildings owned or leased. Efforts will be made to ensure that renovations and new construction is in compliance with the Accessibility Standards adopted by the Saskatchewan Human Rights Commission.

7. Other job barriers such as height of filing cabinets, space between office furniture and other aids to facilitate the employment of persons with disabilities, will be identified during the recruitment and placement process.

Monitoring and Evaluation

17551 1. An internal reporting system to continually audit the progress of SGI's Affirmative Action Program will be developed. The Human Resources Department will be responsible for designing and implementing this system. Reports will be maintained on a current basis in each department, position and occupational category. Quarterly reports will be provided by every manager to the Human Resources Department and the Affirmative Action Committee so that progress can be evaluated. The joint union/management committee will monitor the implementation of the Affirmative Action Program. A summary of the reports and records which SGI will maintain for monitoring purposes, has been filed with the Saskatchewan Human Rights Commission. All records will indicate the persons and/or department(s) responsible and accountable for action taken.

Specific responsibility and accountability of Affirmative Action goals of every executive, director, manager, and supervisor will be included in the management performance appraisal program. It should be noted that the complete monitoring process will not be fully operational until an automated system has been installed at SGI. It is hoped that this system will be functional by the summer of 1985.

Joint Union/Management Affirmative Action Committee

17552 1. The joint union/management Affirmative Action Committee has been in existence since July 1981. The Committee intends to monitor and oversee the progress of the Affirmative Action program on an ongoing basis. On November 10, 1983 a joint letter of approval was signed by Management and Union Officials. This letter authorized the Affirmative Action Committee to formally submit SGI's Affirmative Action Program to the Saskatchewan Human Rights Commission for approval pursuant to Section 47 of *The Saskatchewan Human Rights Code*.

The 1983-84 Budget

17553 1. SGI has allocated and approved a minimum of $20,000.00 for Affirmative Action purposes in 1983. This budget has been approved for activities such as:

a) Training;
b) Educational seminars;
c) Travelling and brochures;
d) Special services; ie. translation services, technical aids, career days and information activities and scholarships.

Regulation 53

> (d) Designation by the sponsor organization of a person to be responsible for the administration of its special program.

17554 The President and Chief Executive Officer, Mr. D. Black, has the overall responsibility and accountability for SGI's Affirmative Action program. On behalf of the President and Chief Executive Officer, the Vice-President of Human Resources, Mr. R.A. Warren, has been assigned the responsibility and accountability for Affirmative Action. Ms. Diane Lemaire, Administrative Assistant to the Vice-President of Human Resources, has been appointed to co-ordinate and oversee the day to day implementation of SGI's Affirmative Action program. The joint union/management Affirmative Action Committee will assume responsibility for monitoring the ongoing progress and development of the program.

17555 The foregoing information indicates that the development of SGI's Affirmative Action plan has been a thorough and comprehensive effort. This is due largely to the hard work of the joint union/management Affirmative Action Committee which as been working co-operatively in preparing the plan since July, 1981. Although a number of intervenors addressed the Saskatchewan Human Rights Commission during the oral hearing, no attempts were made to have the program disapproved. Constructive criticism and recommendations were expressed by the interested parties. However, overall the interested parties all voiced their support and endorsement of the application.

17556 On the evidence presented at the oral hearing, the Saskatchewan Human Rights Commission hereby formally grants approval pursuant to Section 47 of *The Saskatchewan Human Rights Code* to SGI's Affirmative Action program. It should be noted that in accordance with Section 47(3) of *The Saskatchewan Human Rights Code*, nothing done in accordance with this program is a violation of the Code.

17557 The Commission would like to take the opportunity to inform the applicant that Section 15 of Charter of Rights and Freedoms contained in the Canadian Constitution, comes into force April, 1985. At this time, the rights of both physically and mentally handicapped persons will receive constitutional protection. For this reason, programs aimed at improving employment opportunities for mentally handicapped persons should be considered in the very near future by all employers.

17558 In order to ensure the ongoing progress of SGI's Affirmative Action program, the Saskatchewan Human Rights Commission has seen fit to set out the following terms and conditions. The Saskatchewan Human Rights Commission hereby approves the Affirmative Action program of the Saskatchewan Government Insurance Corporation on the following conditions.

TERMS AND CONDITIONS

17559 1. That the Saskatchewan Government Insurance Corporation include in its 1984-1985 annual report to the Saskatchewan Human Rights Commission, progress reports in the following areas:

a) The comprehensive employment systems review.
b) The classifications review.
c) The accessibility study currently being conducted.

2. That the Saskatchewan Government Insurance Corporation provide in its 1984 Annual Report to the Saskatchewan Human Rights Commission, time frames for carrying out the program elements of their Plan.

3. That the Saskatchewan Government Insurance Corporation submit to the Saskatchewan Human Rights Commission a copy of their revised employment application form for review.

4. That the physical demands and analysis report, approved by the joint union/management Affirmative Action committee, be filed with the Saskatchewan Human Rights Commission upon its completion.

5. That any contracts signed between the Native Services Branch, Department of Advanced Education and Manpower and the Saskatchewan Government Insurance Corporation, be filed with the Saskatchewan Human Rights Commission within 30 days of signing.

6. Regulation 42 of *The Saskatchewan Human Rights Code* states that: "Every party involved in the implementation and operation of an approved special program shall report to the Commission by the 30th day of April in each and every year on the actions taken during the preceding year to implement this special program, on the progress of the program, on difficulties encountered in meeting the goals of the program and on any changes to the program it may be considering. Notwithstanding the foregoing, the Commission may at any time request and shall receive such information as is deemed appropriate for the purposes of monitoring compliance with the approved program. If, in the discretion of the Commission, it is determined further investigation is required, the Commission may direct an Affirmative Action Officer to investigate the progress of the special program and report back to the Commission."

CANADIAN
HUMAN RIGHTS
REPORTER

Volume 5, Decision 360 Paragraphs 17609 - 17783 April, 1984

SASKATCHEWAN / PUBLICATION / SEX
Board of Inquiry
Saskatchewan Human Rights Commission v. The Engineering Students' Society et al

Board of Inquiry Decision under the
SASKATCHEWAN HUMAN RIGHTS CODE

Saskatchewan Human Rights Commission
Complainant

v.

**Brent Waldo, Tim Owen, Christopher Goulard,
David Hoffer, Scott McArthur**

and

**The Engineering Students' Society,
University of Saskatchewan**
Respondents

Date: March 7, 1984

Place: Saskatoon, Saskatchewan

Before: Paul Havemann, Ruben Richert, and Joan Thorsteinson

Appearances by: Milton Woodard, Counsel for the Saskatchewan Human Rights Commission
J.H. Clyne Harradence, Counsel for the Engineering Students' Society et al.

Summary: *The Board of Inquiry rules that two issues of the 'Red Eye,' a newspaper regularly published by the Engineering Students' Society, ridiculed, belittled, and affronted the dignity of women contrary to Section 14 of the Saskatchewan Human Rights Code.*

The Board finds that the two issues contain material which promote violent and demeaning treatment of women because of their sex, and this material contravenes Section 14 because it interferes with women's right to equal enjoyment of education, employment and security of the person.

The Board finds that the Saskatchewan Human Rights Code, and the Canadian Charter of Rights and Freedoms, require the balancing of protections for freedom of expression and protections for the equality rights of women. In this case, the Board finds that the material at issue interferes with women's equality rights and is not protected by freedom of expression.

The Board orders that there be no further dissemination of these issues of the 'Red Eye' and requires the Society's executive and the staff of the 'Red Eye' for the academic years 1983-84 and 1984-85 to attend workshops arranged by the Saskatchewan Human Rights Commission. In addition, the Board orders costs to the Commission for unreasonable and unnecessary expense on certain hearing days.

I. BACKGROUND

17609 On July 9th, 1980, Kathleen Storrie, Corresponding Secretary of the Saskatchewan Action Committee on the Status of Women and an Assistant Professor of Sociology at the University of Saskatchewan, Saskatoon, filed a complaint against the University of Saskatchewan, Engineering Students' Society (hereinafter called "the Society") et al, alleging that the publication — *The Red Eye* of the 3rd October 1982, filed as Exhibit P1, contained representations of women

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which ridicule, belittle and otherwise affront the dignity of women in Saskatchewan contrary to the *Saskatchewan Human Rights Code* (hereinafter called "the *Code*") Section 14(1).

> *No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is or they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person, any class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.*

This complaint was not settled.

17610 On 14th April 1981 the Saskatchewan Human Rights Commission (hereinafter called "the Commission") launched a complaint against the Respondents regarding both the 3rd October 1979 (Exhibit P1) and 27th January 1981 (Exhibit P4) editions of *The Red Eye*. It was alleged that the latter editions had also contravened S14(1) of the *Saskatchewan Human Rights Code*. These complaints were initiated under S27(3) of the *Code* which states:

> *Where the commission has reasonable grounds for believing that any person has contravened a provision of this Act, or any other Act administered by the commission, in respect of a person or class of persons, the commission may initiate a complaint.*

17611 These complaints were not resolved and the Commission proceeded under Section 29 of the *Code*:

> *(1) Where the commission, or a person conducting an inquiry on behalf of the commission, is unable to effect a settlement of the matter complained of, the commission shall report to the minister and, in its discretion, may direct a formal inquiry into the complaint to hear and decide the matter or, in the absence of a direction by the commission, the minister may direct such a formal inquiry.*
>
> *(2) A board of inquiry shall consist of one or more persons appointed by the minister to hear and decide the complaint.*
>
> *(3) Immediately after the appointment of a board of inquiry, the minister shall communicate the names of the members of the board to:*
>
> *(a) the commission; and*
>
> *(b) the parties mentioned in clauses 80(1), (b), (c) and (d);*
>
> *and thereupon it shall be conclusively presumed that the board was appointed in accordance with this Act.*
>
> *(4) The members of a board of inquiry appointed under this section shall receive any remuneration for their services and allowances for travelling and other expenses that the Lieutenant Governor in Council may determine.*

17612 As a consequence, the Minister then responsible for the administration of the *Code*, the Honourable Roy Romanow, Attorney General of Saskatchewan appointed a three person Board of Inquiry (hereinafter called the Board). The members of this Board were named on the 17th September 1981.

17613 The parties to an action under the *Saskatchewan Human Rights Code* before a formal Board of Inquiry are set out in Section 30 of the *Code* as follows:

> *(1) The parties to a proceeding before a board of inquiry with respect to any complaint are:*
>
> *(a) the commission, which shall have a carriage of the complaint;*
>
> *(b) the person named in the complaint as the complainant;*
>
> *(c) any person named in the complaint who is alleged to have been dealt with contrary to the provisions of this Act;*
>
> *(d) any person named in the complaint who is alleged to have contravened this Act; and*
>
> *(e) any other person specified by the board, upon any notice that the board may determine and after such person has been given an opportunity to be heard against his joinder as a party.*
>
> *(2) A true copy of the complaint shall be annexed to the notice of the hearing that is given to any party other than the commission.*

17614 The procedures to be followed by such a formal Board of Inquiry are set out in S31 of the *Code* as follows:

> *(1) Subject to any guidelines for formal inquiries that may be established by the commission and to subsections (2) and (3), a board of inquiry may determine its own procedure and may receive and accept any evidence and information on oath, affidavit or otherwise that in its discretion it considers fit and proper, whether admissible as evidence in a court of law or not, and the board of inquiry and each member thereof has all the powers conferred upon commissioners by sections 3 and 4 of The Public Inquiries Act.*
>
> *(2) The oral evidence taken before a board of inquiry shall be recorded.*
>
> *(3) Without restricting the generality of subsection (1), a board of inquiry shall, on a formal inquiry, be entitled to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights secured by this Act, and the board of inquiry shall be entitled to place any reliance that it considers fit and proper on such evidence and on any pattern or practice disclosed thereby in arriving at its decision.*
>
> *(4) Counsel for the commission is entitled to participate in any formal inquiry in the same manner as counsel representing any party thereto, including the right to call, examine and cross-examine witnesses and to address the board of inquiry.*
>
> *(5) The board of inquiry shall inquire into the matters complained of and give full opportunity to all parties to present evidence and make representations, through counsel or otherwise.*
>
> *(6) Where, at the conclusion of an inquiry, the board of inquiry finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.*
>
> *(7) Where, at the conclusion of an inquiry, the board of inquiry finds that the complaint to which the inquiry relates is substantiated on a balance of probabilities, the board may, subject to subsections (9) and (10), order any person who has contravened any provision of this Act, or any*

other Act administered by the commission, to do any act or thing that in the opinion of the board constitutes full compliance with that provision and to rectify any injury caused to any person and to make compensation therefor, including, without restricting the generality of the foregoing, an order:

> *(a) requiring that person to cease contravening that provision and, in consultation with the commission on the general purposes thereof, to take measures, including adoption of a program mentioned in section 47, to prevent the same or similar contravention occurring in the future;*
>
> *(b) requiring that person to make available to any person injured by that contravention, on the first reasonable occasion, any rights, opportunities or privileges that, in the opinion of the board of inquiry, are being or were being denied the person so injured and including, but without restricting the generality of this clause, reinstatement in employment;*
>
> *(c) requiring that person to compensate any person injured by that contravention for any or all of the wages and other benefits of which the person so injured was deprived and any expenses incurred by the person so injured as a result of the contravention;*
>
> *(d) requiring that person to make any compensation that the board of inquiry may consider proper, to any person injured by that contravention, for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the person so injured as a result of the contravention.*

(8) Where a board of inquiry finds that:

> *(a) a person has wilfully and recklessly contravened or is wilfully and recklessly contravening any provision of this Act or any other Act administered by the commission; or*
>
> *(b) the person injured by a contravention of any provision of this Act or any other Act administered by the commission has suffered in respect of feeling or self-respect as a result of the contravention;*

the board of inquiry may, in addition to any other order it may make under subsection (7), order the person who has contravened or is contravening that provision to pay any compensation to the person injured by that contravention that the board of inquiry may determine, to a maximum of $5,000.

(9) Where an inquiry is based on a complaint regarding discrimination on the basis of physical disability and the board of inquiry finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging or to have engaged in the discrimination impede physical access thereto by, or lack proper amenities for, persons suffering from the physical disability that was the subject of the inquiry, the board of inquiry, shall, by order, so indicate and shall include in its order any recommendations that it considers appropriate, but, where the person found to be engaging in or to have engaged in the discrimination establishes that the cost or business inconvenience that would be occasioned in the provision of such amenities or physical access would constitute, in the opinion of the board, an undue hardship, then the board of inquiry may not make an order under subsection (7).

(10) No order made under subsection (7) shall contain a term:

> *(a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or*
>
> *(b) requiring the expulsion of an occupant from any housing accommodation if the occupant attained that housing accommodation in good faith.*

(11) Where there are more than two members of a board of inquiry, a decision of the majority of the members of the board is the decision of the board, but, in the absence of a decision of the majority, the decision of the chairperson is valid and binding.

(12) No member of a board of inquiry hearing a complaint shall have taken part in any investigation or consideration of the complaint prior to the hearing or shall communicate directly or indirectly in relation to the complaint with any person or his representative except upon notice to all parties and opportunity for all parties to participate, but the board may seek legal advice independent of the parties and in that case the nature of the advice shall be made known to the parties in order that they may make submissions as to the law.

Neither the Commission nor the Board established any guidelines or special procedures for the conduct of this formal Inquiry.

17615 The additional powers conferred on members of a Board of Inquiry set out in Sections 3 and 4 of *The Public Inquiries Act* are as follows:

> *3. The commissioners shall have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to inquire. R.S.S. 1965, c.19, s.3.*
>
> *4. The commissioners shall have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases. R.S.S. 1965, c.19, s.4.*

17616 Formal Notice of Hearing was sent by registered mail to all parties on the 2nd of December 1981. Hearing dates of the 21st and 22nd January were set down. Earlier attempts to set dates in November 1981 which would have been mutually convenient to all including Board and Counsel for both parties were unsuccessful due to the unavailability of Counsel for the Engineering Students' Society et al. Counsel for the Society did not appear for the hearing on the 21st January 1982 and the matter was adjourned at the request of the Society's President, Mr. Christopher Goulard, to the 9th and 10th of March 1982. Thereafter the hearing continued on the 3rd and 6th days of May, 1982; the 18th day of October, 1982; the 27th day of January, 1983; the 2nd day of March, 1983; the 21st, 22nd and 25th days of April, 1983. The parties agreed to submit Written Argument by way of Summation. These were received by the Board on the 9th day of May, 1983 and Written Arguments by way of Rebuttal were received from both parties on the 17th day of May,

1983. Transcripts of the final days of hearing were received from the court reporter on the 14th day of June, 1983.

17617 The protracted nature of proceedings can in part be attributed to the extraordinary lengths to which the Board had to get to meet the convenience of the respondent students and their Society's counsel. The learned Judge in Chambers addressing the ground of delay charged in the Society's second application for Writs of Prohibition and Certiorari in Aid stated:

> *I reject emphatically the complaint that the Board has "delayed the hearing to this matter." The affidavit material leads me to the contrary conclusion. If blame is to be attributed to any person it is to the Society* (per Wright, J., Engineering Students' Society v. the Saskatchewan Human Rights Commission, 30 March 1983, p. 16).

Two applications to prohibit the Board from proceeding were made based upon the usual grounds that the Board was acting in excess of or abusing the scope of its jurisdiction and that the proceedings had been conducted in a fashion contrary to natural justice or reflecting bias. These too slowed the pace of proceedings. The first of these were heard on the 30th of November 1982 by the presiding Judge in Chambers in Saskatoon. This application for Prohibition and Certoriari was dismissed on technical grounds rather than on its merits. The style of cause of Writs had been drafted naming the Commission rather than the Board as the body to be stopped from proceeding. The Commission was a party to the action and not the tribunal hearing the action. This application was dismissed.

17618 The second application of Writs of Prohibition and Certoriari in Aid thereof was heard on its merits and the learned Judge in Chambers did not find any of the grounds substantiated. Consequently he issued an order dismissing the application on the 30th day of March 1983.

17619 These events bear repetition here since it has taken from the 9th day of July 1980 and the 14th day of April 1981 until this date for the matters complained of to be adjudicated upon. The Board echoes the observations of the learned Judge in Chambers contained in his judgment with respect to the second unsuccessful application for Prohibition.

> *I expressed my concern and dismay during argument as to the length of time it has taken the Board of Inquiry to deal with the Commissions' complaints. The persons aggrieved by the publication and members of the Society are not the only persons affected by the delay. The community as a whole is affected if its members suspect that charges of sexism, racism or whatever cannot be investigated and determined promptly by tribunals created for that specific purpose. Future boards, given the history of these proceedings may fare better. The oft repeated statement that justice delayed is justice denied is no less applicable to administrative and quasi judicial bodies than to Courts of law* (per Judge Wright, Engineering Students' Society v. the Saskatchewan Human Rights Commission, 30 March 1983).

17620 Given the present powers of Boards of Inquiry under the *Code*, the prevention of a repetition of this saga will be in the hands of Counsel for the parties. Counsel's cooperation and courtesy is absolutely essential to the functioning of such administrative and quasi-judicial bodies.

II. THE COMPLAINT

17621 The Board is charged with hearing and deciding on the balance of probabilities whether or not the complaint by the Commission is substantiated. The complaint filed before the Board as Exhibit P3 reads as follows

COMPLAINT UNDER PART II OF THE HUMAN RIGHTS CODE, 1979

1. THE SASKATCHEWAN HUMAN RIGHTS COMMISSION, with its head office located at 8th Floor, 224 - 4th Avenue South, Saskatoon, Saskatchewan, telephone 664-5952, hereby initiates a complaint against Brent Waldo and Tim Owen, Past Presidents, and Christopher Goulard, President, all of the Engineering Students Society, and Scott McArthur, Past Editor and David Hoffer, Editor of the publication "The Red Eye" and against Christopher Goulard as representative of all members of the Engineering Students Society with offices located at Room 302.1, College of Engineering, University of Saskatchewan, Saskatoon, Saskatchewan, telephone 343-5352.

2. The alleged violations took place in or around the months of September and October, 1979 and in or around the month of January, 1981.

3. The complaint alleges that women in the Province of Saskatchewan were discriminated against because of their sex.

4. The particulars of the alleged violations are as follows:

That in or around the months of September and October, 1979 the respondents published or caused to be published in a newspaper or printed matter dated October 3, 1979 entitled "The Red Eye," which the respondents own, control and distribute articles, notices, symbols and other representations that ridicule, belittle and otherwise affront the dignity of women because of their sex.

That in or around the month of January, 1981 the respondents published or caused to be published in a newspaper or printed matter which was undated, bearing the headline "Women Inferior to Engineers," entitled "The Red Eye," which the respondents own, control and distribute articles, notices, symbols and other representations that ridicule, belittle and otherwise affront the dignity of women because of their sex.

Each of the above copies of "The Red Eye" were circulated throughout the College of Engineering and University of Saskatchewan campus by being placed at many and various places where they could be picked up by passers-by without charge.

It is alleged that by publishing or causing to be published the said editions of "The Red Eye" described above, in the manner aforesaid, the respondents have violated Section 14(1) of the *Saskatchewan Human Rights Code*.

This action is initiated in part as a class action by the Saskatchewan Human Rights Commission pursuant to Section 27(3) of the *Saskatchewan Human Rights Code*, in respect of all women who are resident in the Province of Saskatchewan and in respect of all members of the Engineering Students Society as represented by Christopher Goulard, Present President.

DATED AT Saskatoon, Saskatchewan on April 14, 1981.

(Signed)

Ken Norman, Chief Commissioner
Saskatchewan Human Rights Commission

17622 The Complaint alleges violations of S14(1) of the *Code*:

> *No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is or they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person, any class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.*

This complaint requires that two categories of questions shall be determined.

Category A

17623 Does the material ridicule, belittle and otherwise affront the dignity of women? In particular:

i) Did material in a newspaper or printed matter dated October 3rd, 1979 entitled *The Red Eye* (Exhibit P1) contain articles, notices, symbols and other representations that ridiculed, belittled, and affronted the dignity of women because of their sex?

ii) Did material in a newspaper or other printed matter dated January 27, 1981 entitled *The Red Eye* (Exhibit P4) contain articles, notices, symbols and other representations that ridiculed, belittled and affronted the dignity of women because of their sex?

Category B

17624 Did the Respondents publish or control or own or distribute the above material? In particular:

i) (a) Did the Engineering Students' Society at the material time; (b) did Brent Waldo as President of the Engineering Students' Society at the material time; (c) did Christopher Goulard as President of the Society at the time of the complaint was made at the material time, publish, or cause to be published in or around September or October 1979 a newspaper or printed matter dated October 3, 1979 entitled *The Red Eye* which they owned or controlled or distributed throughout the College of Engineering and the University of Saskatchewan campus in Saskatoon in violation of Section 14(1) of the *Code*?

ii) (a) Did the Society at the material time; (b) did Tim Owen, President of the Engineering Students' Society at the material time; (c) did Christopher Goulard as President of the Society at the time the complaint was made at the material time, publish or cause to be published in or around January 1981 a newspaper or printed matter entitled *The Red Eye*, dated January 27, 1981, which they owned or controlled or distributed throughout the College of Engineering and the University of Saskatchewan campus in Saskatoon in violation of Section 14(1) of the *Code*?

Section 27(3) of the *Code*.

> *(3) Where the commission has reasonable grounds for believing that any person has contravened a provision of this Act, or any other Act administered by the Commission, in respect of a person or class of persons, the commission may initiate a complaint.*

empowers the Commission to initiate a complaint on behalf of any person or class of persons. The class of persons in this complaint consists of all women who are resident in Saskatchewan.

17625 The requirements respecting class actions in Section 12 of the Regulations made by the Provincial Attorney General under Section 46 of the *Code* do not apply to complaints initiated by the Commission under Section 27(3) of the *Code*. The argument that they did was made by Counsel for the Society in his Written Argument. The Board determined that the Commission was the Complainant and therefore, that the class action requirements did not apply. This power to initiate complaints of its own motion based on reasonable grounds is clearly essential so that the Commission may fulfill its objects under Section 3, its statutory duties under Section 25 and its responsibilities to the Minister of Justice under Section 26 of the *Code*.

II THE LAW

Category A: Does the Material Ridicule, Belittle and Otherwise Affront The Dignity of Women Because of Their Sex Contrary to Section 14(1) of the *Code*?

1. Interpretation of Statutes

17626 Provisions such as Section 14(1) of the *Code* have been a part of the regimes of anti-discrimination legislation for forty years. Discrimination by means of notices, signs, symbols, advertisements, messages and other forms of material was first prohibited in Canada in Section 1 of the *Ontario Racial Discrimination Act*, S.O. 1944, C51. *Saskatchewan's Bill of Rights Act*, S.S. 1947, C35, Section 14 was the next piece of such legislation. This Section was repealed and replaced by the *Saskatchewan Human Rights Code*, S.S. 1979, S24.1, Section 14 of which is the basis of the present complaint. Legislatures have thus recognized a social interest to be protected by the enforcement of human rights of this kind for some time.

2. Interpreting Human Rights Legislation

14627 Counsel for the Society submitted a written argument that "*there is no definition of what might ridicule, belittle or otherwise affront the dignity of women*" (p. 12) and that "*Section 14 of the Code lays down no guidelines*", which might assist the public in determining what might contravene the *Code*. The Board does not accept these propositions.

17628 The following principle of Construction appears most apposite in determining the law in this matter.

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament* (E.A. Driedger, The Construction of Statutes, Butterworths, Toronto, 1974) p. 67.

17629 The context in which the *Code* should be interpreted is set out briefly below. Section 3 of the *Code* states:

> *The objects of this Act are:*
>
> *(a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and*
>
> *(b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.*

17630 The statutory duties of the Commission amplify this context further as Mr. Justice C.F. Tallis observed:

> *11704. Under the Code the work of the Commission is not limited to instituting prosecutions for violations or making compensation awards. In my opinion, the code, when looked at as a whole, reflects the public's growing interest in human rights. This is illustrated by the Statutory duties imposed on the Commission under Section 25 which reads:*
>
> *The Commission shall:*
>
> *(a) forward the principle that every person is free and equal in dignity and rights without regard to his race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin;*
>
> *(b) promote an understanding and acceptance of, and compliance with, this Act;*
>
> *(c) develop and conduct educational programs designed to eliminate discriminatory practices related to the race, creed, religion, color, sex, marital status, physical disability, age, nationality, ancestry or place of origin of any person or class of persons;*
>
> *(d) disseminate information and promote understanding of the legal rights of residents of the province and conduct educational programs in that respect;*
>
> *(e) further the principle of the equality of opportunities for persons, and equality in the exercise of the legal rights of persons, regardless of their status;*
>
> *(f) conduct and encourage research by persons and associations actively engaged in the field of promoting human rights;*
>
> *(g) forward the principle that cultural diversity is a basic human right and fundamental human value* (per Tallis, J.A., in *Peter Glendinning v. Corporal Scowby et al* (1983) CH.R.D. D/1355, pp. 1356-8).

17631 Counsel for the Commission in Written Argument urged the Board to give the specific words of Section 14(1) their plain meaning in the context of the legislation in which they appear. He suggested that the words, "*ridicule, belittle*" and "*affront the dignity of*" are words of "*common parlance*" with "*commonly understood meanings.*"

17632 The Board addressed itself to the problems of the literal method of construction. E.A. Driedger, in his practitioners' work, *The Construction of Statutes*, Butterworths, Toronto, .1974 states:

> *In construing statutes we may start with the principle laid down by Lord Wensleydale in Grey v. Pearson where he said "that in construing wills and indeed Statutes, and all written instruments, the grammatical and ordinary sense of words is adhered to;" and then as Chief Justice Tindal said in the Sussex Pierage case "if the words of the Statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense"* (p. 3.).

17633 An examination of the *Shorter Oxford Dictionary* (1973) and the more basic *Webster's New Collegiate Dictionary* (1981) definitions of the words "ridicule, belittle, affront," and "dignity" lead us to support the submission that these words are not technical terms or terms of art. In the context of the *Code* they have their usual and plain meaning. The words of Lord Reid in *Brutus v. Cozens* [1973] Ac 854 at p. 861 are instructive:

> *The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the Court will determine in other words what that unusual sense is.*

17634 In this case the words are not unusually used. The Board accepts the submission that it does not need to make a determination on meaning and that the ordinary dictionary definitions will suffice. These are as follows:

> "ridicule"
>
> *1. To render ridiculous. 2. To treat with ridicule or mockery; to make fun of, deride, laugh at* (*Shorter Oxford English Dictionary* 1973, p. 1830).
>
> *1. The act to exposing to laughter: 2. to make fun of, to make an object of laughter* (*Webster's New Collegiate Dictionary* 1981, p. 988).
>
> "belittle"
>
> *1. To diminish in size. 2. To dwarf. 3. To depreciate* (*Shorter Oxford English Dictionary* 1973, p. 178).
>
> *1. to cause to seem little or less. 2. disparage* (*Webster's New Collegiate Dictionary* 1981, p. 100).
>
> "affront"
>
> *1. To insult to the face or openly. 2. To put to blush; to cause to feel ashamed. 3. To face in defiance; confront* (*Shorter Oxford English Dictionary* 1973, p. 34).
>
> *1. to insult esp. to the face by behavior or language, 2. to face in defiance: to encounter face to face, 3. to appear directly before* (*Webster's New Collegiate Dictionary* 1981, p. 20).
>
> "dignity"
>
> *Worthy, the quality of being worthy* (*Shorter Oxford English Dictionary* 1973, p. 549).
>
> *1. the quality of state of being worthy, honored, or esteemed, 2. high rank, office, or position: a legal title of nobility or honor, 3. formal reserve of manner or language* (*Webster's New Collegiate Dictionary* 1981, p. 316).

17635 Additional guidance on the methods by which provisions of Human Rights legislation ought to be interpreted so as to attain their objects was stated by the Saskatchewan Court of Appeal in 1950 with respect to an appeal concerning the *Saskatchewan Bill of Rights* 1947. In *Smart* v. *Livett*, 1950 1W.W.R. (N.S.) 49, Mr. Justice Gordon stated:

> *Such an Act as this endeavouring to guarantee to everyone in the Province certain basic rights should be given the widest possible interpretation. This Act gives rights which go to the very root of our democratic institutions and ensures protection to persons who are endeavouring to carry out their own legal obligations* (p. 65).

17636 This principle for the interpretation of Human Rights legislation has found contemporary support from Mr. Justice D.C. MacDonald in *RE: the Attorney General for Alberta and Gares et al* (1976) 67 D.L.R. (3rd) 635 at p. 690 and Mr. Justice Thurlow in the *Attorney General of Canada v. Canadian Human Rights Commission (Federal Court)* 1980, 1CHRR D/91.

17637 The *Code* like other Human Rights legislation is not penal legislation to be narrowly construed. The words in Section 14(1) "*ridicule, belittle, affront,*" and "*dignity*" are to be given their plain meaning so as to effect the objects of the *Code* set out in Section 3, and the statutory duties of the Commission as set out in Section 25. The Constitutional context in which Human Rights legislation should be interpreted further includes the *Canadian Charter of Rights and Freedoms* under Part I Schedule B of the *Canada Act* 1981 in general; and the objects of such relevant international Human Rights Covenants to which Canada is a party. In this matter the Covenants of special relevance are the *International Covenant on Civil and Political Rights* and the *Optional Protocol* to the International Covenant to which Canada became a party on the 19th day of August 1976 and the convention on the *Elimination of all Forms of Discrimination Against Women* which was ratified by Canada with Saskatchewan's consent in 1981.

3. Freedom of Expression versus the Prohibition of Discriminatory Notices, Signs, Symbols, Emblems and Other Representations in Media of Communication

17638 Counsel for the Society submitted the argument that for the Board to find the editions of *The Red Eye* before it to be in violation of S14(1) was a restriction upon "*fair comment,*" and "*freedom of publication,*" and was "*improper censorship,*" and "*totally contrary to the basic rights of freedom of expression no matter how offensive, distasteful, vulgar or lacking in merit*" (Written Argument, pp. 18-19).

17639 Legislatures when enacting Human Rights provisions of the type embodied in S14(1) in the *Code* have had the difficult task of reconciling two competing social interests.

17640 One social interest is represented in the fundamental freedom of expression set out in the Constitution under Section 2(b) of the *Charter of Rights and Freedoms* as follows:

> *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications;*

17641 The *Code* sets out similarily worded provisions in S5. It states:

> *Every person and every class of persons shall, under the law, enjoy the right to freedom of expression through all means of communication, including, without limiting the generality of the foregoing, the arts, speech, the press or radio, television or any other broadcasting device.*

17642 The other social interest is represented in equality rights, such as the right not to be discriminated against on the basis of criteria such as one's race, national or ethnic origin, colour, religion, age, mental or physical disability. These rights are set out in S15 of the *Charter* as follows:

> *(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
>
> *(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

17643 To re-inforce the need to balance competing rights, Sections 2 and 15 are on the same footing in the *Charter*, neither prevails over the other.

17644 In the *Code* we find Section 5 and anti-discrimination or equality rights in Sections 9 to 19 in Part II, including Section 14. Section 14 is clearly intended to co-exist in parity with Section 5. It should also be noted that Section 14(2) expressly states:

> *Nothing in subsection (1) restricts the right to freedom of speech under the law upon any subject.*

Tarnopolsky comments on exemptions of the Subsection 14(2) variety:

> . *Although this exemption has been included from the beginning, since the Ontario Racial Discrimination Act of 1944, it is argued below in this Chapter that this exemption merely exhibits excessive caution and is probably superfluous* (W. Tarnopolsky, *Discrimination and the Law*, Richard DeBoo, Don Mills, 1982, p. 330).

17645 The reconciliation of the social interest in the freedom of expression and the social interest in the enforcement of rights guaranteeing equality of treatment for all is sometimes accomplished through restrictions on the scope of the freedom of expression by legislative and judicial means. The phrase "*under the law*" in Section 14(2) clearly acknowledges this type of restriction in the *Code*.

17646 Counsel for the Commission surveyed the nature and scope of these restrictions extensively. In the realm of municipal law at the national level it was argued that Section 2 of the fundamental freedoms section co-exists with Section 1 of the *Charter* which employs the following restriction:

> *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

17647 The Board accepts the proposition that the *Code* was consistent with the *Charter* and that both protected the same competing social interests to which we have referred. Different techniques for drafting those protections and restrictions have been adopted and that is all.

17648 In the realm of the International Law Covenants by which Canada and Saskatchewan are bound, the competing social interests are no less evident.

17649 Mr. Justice Tallis in *Glendinning v. Scowby et al* (1983) 1CHRR D/1355 emphasized the importance of compliance with the international commitments Canada has made in the area of Human Rights. In paragraph 11701 he states:

> *In my opinion, this question cannot be answered without reference to the institutional setting of the Commission and the Board of Inquiry constituted there under* [sic]. *In more recent times there has been a marked shift in emphasis to human rights, not only at the provincial and national level, but also at the international level. As a starting point, I would make passing reference to the "International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant," which was adopted by the United Nations Assembly on 16th December 1966, and which came into effect on the 23rd March 1976. On the 16 May 1976 Covenant and its optional Protocol with the same taking effect in Canada on the 19th August 1976.*

17650 The *Covenant* approaches the reconciliation of the freedom of expression with equality rights in the following fashion. Article 19 of the *Covenant* provides:

> *1. Everyone shall have the right to hold opinions without interference.*
>
> *2. Everyone shall have the right to freedom of expressions; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally, in writing or in print, in the form of art or through other media of his choice.*
>
> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) for respect of the rights and reputations of others;*
>
> *(b) for the protection of national security or of public order, or of public health or morals.*

17651 At all three levels of the law at the provincial in the *Code*, at the national in the *Charter*, and at the international in the *International Covenant on Civil and Political Rights*, the Board is bound by legislation which promotes both the freedom of expression and egalitarian rights such as those prohibiting discrimination on the basis of sex. Such legislation in each instance places restrictions on the former to further the latter type of social interest.

17652 Statutory and common law limitations on the freedom of expression in Canada are numerous. These limitations are to be found in the law of defamation, the law of contempt of court, the law relating to election campaigns, the law relating to commercial speech and the C.R.T.C.'s advertising guidelines. Restrictions contained in the *Canadian Criminal Code* R.S.C. 1970 C-34 relate to sedition Sections 60-63; defamatory libel Sections 261-280; hate propaganda Section 281(1) and (2); and obscenity Sections 159-164. The law relating to human rights among others constitutes yet another example of such legislation.

17653 The courts have enunciated tests determining when some rights may be abrogated to protect other rights. Counsel for the Commission reviewed the pertinent case law for the Board.

17654 Prior to the enactment of the *Canadian Bill of Rights*, the Courts had to spell out the rationale of fundamental rights, such as freedom of expression. The classic decision on freedom of expression was the reference *Re: Alberta Legislation* [1938] S.C.R. 100. The Social Credit Government of Alberta passed legislation to restrain editorial commentary in the provincial newspapers. The Supreme Court of Canada had to consider whether "An Act to Ensure the Publication of Accurate News and Information" was ultra vires the powers of the provincial legislature under the Constitution established by the *British North America Act* 1867, Sections 91 and 92. Mr. Justice Cannon offered an explanation of the situations in which the freedom of expression and discussion is protected and those when it may be abrogated:

> *Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent electors getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of people to be informed through sources independent of government concerning matters of public interest* (p. 145).

He continued, adding a qualification to this principle in the final lines of the quoted passage:

> *As stated in the preamble of the British North America Act, our Constitution is and will remain, unless radically changed "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of those matters affecting the state within those limits set by the Criminal Code and the Common Law* (p. 145).

17655 The social interest in freedom of expression lies in its contribution to the full and free analysis of government policy, enlightened public opinion and the facilitation of the citizenry to enable them to attack the operation of the major institutions in the democratic state by democratic means.

17656 In the same judgment Chief Justice Duff qualified the right of freedom of expression precisely to allow for such restrictions as are constituted by Section 14(1) of the *Code*:

> *The right of public discussion is of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which for example the laws of defamation and sedition are concerned. In a word, freedom of discussion means to quote the words of Lord Wright in James v. Commonwealth of Australia "freedom governed by law."* (p. 133).

17657 A fuller version of Lord Wright's words in *James v. Commonwealth of Australia* [1936 A.C. 578] is as follows:

> *"Free" in itself is vague and indeterminate . . . Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and soforth; it means freedom governed by law* (p. 527).

Section 14(1) is an example of such law.

17658 Further reaffirmation of such tests and qualifications were made by Chief Justice Rinfret of the *Supreme Court of Canada in Boucher v. the King* (1950) 1D.L.R. 657 at p. 666.

These observations are particularly relevant to the submissions made by Counsel for the Society on pp. 18-19 of his Written Argument regarding the scope of freedom of expression. Chief Justice Rinfret stated:

> *I would not like to leave this appeal however without stating that to interpet freedom as licence is a dangerous fallacy. Obviously, pure criticism of expression of opinion, however severe or extreme is, I might also say to be invited, but as we said elsewhere there must be a point where individual freedom of expression is justified and required on the grounds of reason, or on the grounds of the democratic process and the necessities of the present situation.*
>
> *It should be understood from this Court — the Court of last resort in criminal matters in Canada that persons subject to Canadian jurisdiction can not insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results which are often inevitable* (p. 666).

17659 The legislature of Saskatchewan has enacted S14(1) of the *Code* to prohibit the evil results which flow from expressions tending, or likely to tend to deprive, abridge or otherwise restrict the enjoyment by persons or class of persons of any right to which he is or they are entitled under the law, or which exposes or tends to expose to hatred, ridicule, belittles, or otherwise affronts the dignity of, any person, any class of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.

17660 Since 1776 the United States of America has had a constitutional document ensuring fundamental freedoms. It is also instructive, therefore, to review some of the aspects of the social interest in freedom of speech which have been protected in that jurisdiction. When Counsel for the Commission reviewed the cases, he appears to have sought not simply to dwell upon the legitimacy of restrictions upon the freedom of expression but also to set out the purposes for which this fundamental freedom exists.

17661 The Supreme Court of the United States isolated such social interests as individual self-expression; the advancement of truth, science, morality and arts in general (see *Roth v. the United States*, 354 U.S. 476, p. 484); the exposition of ideas of social value (see *Chaplinsky v. New Hampshire*, 315, U.S. 568); the satisfaction of the need for information and education with respect to the significant issues of the times (see *Thornhill v. Alabama*, 310 U.S. 88, p. 488); the historical function of providing information needed or appropriate to enable members of society to cope with the exigencies of the period (see again *Thornhill v. Alabama*, 310, U.S. 88, p. 488).

17662 The Board has little difficulty, nonetheless, in accepting the argument that S14(1) of the *Code* does not prohibit every type of insult to a protected class.

17663 Great caution must be exercised before making any determination abridging the free expression of others. Where no redeeming social interest is evident the freedom of expression may be abridged. When this is the case it is done without infringing any constitutional rights. Thus, when representations infringe upon the rights of others such as their egalitarian rights the freedom of expression will be restricted.

3. Sexism, Racism, Hate Propaganda, Egalitarian Rights and the Freedom of Expression

17664 Counsel for the Commission submitted that:

> *. . . there is no logical reason to treat matters which ridicule, belittle and affront the dignity of a protected class of persons differently from hate literature* (Written Argument, p. 45).

17665 The particulars of the Complaint (Exhibit P3) made by the Commission do not allege that the editions of *The Red Eye* "*exposed or tended to expose to hatred*" the Complainants under Section 14(1) of the *Code*.

17666 In argument Counsel for the Commission suggests, however, that there is material in the editions of *The Red Eye* (Exhibits P1 and P4) which *inter alia* contains themes which:

> *(a) Suggests that the violent destruction of women's bodies through sexual acts is humorous;*
>
> *(b) suggests that women have no capacity to feel, think, analyse, debate; or in other words are less than human;*
>
> *(c) promotes either sexual violence against or sexual harassment of women; or*
>
> *(d) depicts women's bodies as objects and thereby depicts women as less than human* (Counsel for the Commission's Written Argument, p. 11).

17667 Where material in a publication contains themes such as these the question arises — does this material not expose or tend to expose women to hatred? Another question put is — would there be any doubt that a violation of Section 14(1) existed if race rather than sex formed the nexus of the class against whom offending themes in the allegedly discriminatory material was directed?

17668 The Board was not hearing a particular allegation that the material exposed or tended to expose women to hatred since the Commission did not allege this. The relevance of the law relating to hate literature and the identification of Counsel for the Commission of misogynistic material in the two offending editions of *The Red Eye* (Exhibits P1 and P4) nonetheless assisted the Board in two ways.

17669 Primarily, the analogy between the law relating to racial discrimination by hate literature and sex discrimination is a very close one. Hence, tests to assist the Board in determining what is discriminatory on the grounds of race were useful to the Board with respect to sex discrimination of the kind complained of by the Commission. Hitherto, there have been no reported decisions interpreting the legislation with respect to sex discrimination of the sort which S14(1) of the *Code* seeks to combat.

17670 Secondly, the evidence of the mysogynistic nature of material in these newspapers went to assist in determining the question whether or not these are the kind of publications whose merits are such that the social interest in protecting free expression of their ideas outweighs the social interest embodied in the objectives of the *Code*. The objectives of the *Code* are the protection of egalitarian rights such as those embodied in the *Code* and the other relevant legislation.

17671 The *Charter*, the *Criminal Code* and provincial *Human Rights Codes* have all been marshalled to promote the egalitarian rights of minorities. The egalitarian rights of women are taking much longer to be recognized and enforced. This reflects the dominance of male interests in our social, legal and political institutions. A digression to explore the analogy between discrimination on the grounds of gender and race was useful to the Board.

17672 Counsel for the Commission drew the attention of the Board to the historical evolution of the *Canadian Criminal Code* provisions against hate propaganda. The Report of the Special Committee on Hate Propaganda, 1966 chaired by Maxwell Cohen, offers the following rationale for legislation to prohibit hate propaganda against racial minorities. The rationale to extend S14(1) to persons or classes because of their sex appears from the objects of the *Code* and other relevant legislation to be much the same as the one articulated by the Special Committee:

> *The Committee has concluded that minority groups are entitled to the assurance that society protects them not only against physical attack but also against threats and vilifications directed at them solely because of their religion, colour, race, language, ethnic or national origins. The feasibility of changes in the law along this line is discussed later in the Report, but there is no doubt in our view as to the general desirability of measures which help to create a social climate that is uncongenial to hate propaganda and their message* (p. 33).

The Cohen Report continued by discussing the presence of any social interest in protecting the freedom to express racial hatred.

> *The propaganda distributed has attacked various racial, religious and ethnic groups particularly Jews, Negroes, in abusive, insulting, scurrilous and false terms, and these pamphlets, handbooks, booklets, etc. could not in any sense be classed as sincere, honest discussion contributing to the legitimate debate, in good faith, about public issues in Canada* (Report to the Minister of Justice on the Special Committee on Hate Propaganda, Queen's Printer, Ottawa, 1966, p. 59).

17673 The result of the deliberations of this Special Committee are Section 281.2(1) and (2) of the *Criminal Code of Canada* R.S.C. 1970 C-34:

> *(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of*
>
> > *(a) an indictable offence and is liable to imprisonment for two years; or*
> >
> > *(b) an offence punishable on summary conviction.*
>
> *(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of*
>
> > *(a) an indictable offence and is liable to imprisonment for two years; or*
> >
> > *(b) an offence punishable on summary conviction.*

17674 These inchoate offences, namely, incitement and counselling of hatred are complex. They ara illustrative of many compromises which had to be made to secure passage of criminal offences of this kind through Parliament. It is clearly penal legislation to be narrowly construed. The "*identifiable group*" or groups they are intended to protect exclude women and this term is confined to "*any Section of the public distinguished by colour, race, religion or ethnic origin*" (see Section 381.1(4)). Furthermore, it is not an offence of strict liability but a crime requiring proof of intent (see *R. v. Buzzanga* (1979) 101 D.L.R. 3d 488 (C.A.)). The mens rea for Subsection 281.2(1) is the intent to incite hatred with the reasonable foresight that a breach of the peace will result. Subsection 281.2(2) requires conduct involving the wilful promotion of hatred. The promoter does not have to successfully arouse hatred to be guilty. In both Subsections the prohibited surrounding circumstances are that the counselling be committed in "*public*" in Subsection 1 or "*other than in private conversation*" in Subsection 2. We can glean from this that Parliament felt that there was a social interest to be served by having offences on the statute books which made promoting racial hatred an offence. Thus, we find a moral standard with respect to hate propaganda buttressed by the Criminal Law with the gravity and complexity which this entails. In the Criminal Law it appears that women must take a circuitous route and employ the blunt instrument of the law relating to pornography, namely, obscenity to enforce protections from some of the widespread manifestations of hatred focussed upon them. Section 14(1) of the *Code* appears to offer the only vehicle for women in Saskatchewan to enforce equality rights of the kind abrogated by hate literature as such. Section 14(1) does not require proof of intent to ridicule, belittle or affront the dignity of women.

17675 Counsel for the Commission offered further analogies from the administrative law to support his contention that by way of analogy the type of mischief complained of by the Commission does have remedies in other jurisdictions. He cited the example of the *British Columbia Civil Rights Protection Act*, 1982.

17676 Following the report by John D. McAlpine for the British Columbia, Minister of Labour (McAlpine, John D., Report arising out of the Activities of the Klu Klux Klan in British Columbia, Queen's Printer, Victoria, 1981) the British Columbia legislature created civil wrong respecting hate literature. This tort can be actionable without proof of damage. The Attorney General of the Province can be joined as an intervening party. This tort offers scope for a class action for group "defamation" on the following grounds under the *British Columbia Civil Rights Protection Act* 1982, S.B.C. C12, Section 7 which reads as follows:

> *(1) In this Act, "prohibited act" means any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting*
>
> > *(a) hatred or contempt of a person or class of persons, or*
> >
> > *(b) the superiority or inferiority of a person or class of persons in comparison with another or others,*
>
> *on the basis of colour, race, religion, ethnic origin or place of origin.*
>
> *(2) A prohibited act is a tort actionable without proof of damage,*

> *(a) by any person against whom the prohibited act was directed, or*
>
> *(b) where the prohibited act was directed against a class of persons, by any member of that class.*
>
> *(3) Where a corporation or society engages in a prohibited act, every director or officer of the corporation or society who authorized, permitted or acquiesced in the commission of the prohibited act may be sued by the persons referred to in subsection (2) and is liable in the same manner as the corporation or society.*
>
> *(4) In an action brought under this section, the commission of a prohibited act by any director or officer of a corporation or society shall be presumed, unless the contrary is shown, to be done, authorized or connived in by the corporation or society.*
>
> *(5) An action under this section shall be commenced in the Supreme Court.*

17677 Subsection 1 (1)(a) prohibits the promotion of hatred or contempt, Subection 1 (1)(b) prohibits promoting the superiority or inferiority of a person or class of persons. A close analogy with S14(1) provisions of the *Code* appears. This Act does not, however, protect a person or class of persons on the grounds of their sex. It is confined to discrimination on the grounds of colour, race, religion, ethnic origin or place of origin. This further illustrates the means by which human rights legislation is attempting to effect objectives such as the protection of equality rights. The neglect of women is all the more noticeable in this recent legislation. It is, however, reassuring that with respect to all rights including the equality rights entrenched in the *Charter* that Section 28 applies to them. This reads as follows:

> *. . . notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*

17678 The Board accepted the logic that analogies from racial discrimination, while not complete, are nonetheless useful in determining issues of sex discrimination.

III. THE EVIDENCE RE: CATEGORY A QUESTIONS

1. Does the Material Ridicule, Belittle and Otherwise Affront the Dignity of Women Because of Their Sex Contrary to S14(1) of the Code?

17679 There was a great deal of evidence given in this Inquiry, comprising of 10 exhibits and testimony from 23 witnesses heard on no less than eleven occasions. Category A questions involve the two publications named in the Complaint.

17680 The relevant particulars of the alleged violations of Section 14(1) of the *Code* with respect of *The Red Eye* are as follows:

> *That in or around the months of September and October, 1979 the respondents published or caused to be published in a newspaper or printed matter dated October 3, 1979 entitled "The Red Eye", which the respondents own, control and distribute articles, notices, symbols and other representations that ridicule, belittle and otherwise affront the dignity of women because of their sex.*

Hereafter referred to as the October 1979 edition, and

> *That in or around the month of January, 1981 the respondents published or caused to be published in a newspaper or printed matter which was undated, bearing the headline "Women Inferior to Engineers", entitled "The Red Eye", which the respondents own, control and distribute articles, notices, symbols and other representations that ridicule, belittle and otherwise affront the dignity of women because of their sex.*

Hereafter referred to as the January 1981 edition.

17681 *The Red Eye* in its October 1979 and January 1981 editions is printed in a tabloid, newspaper format. It is illustrated by photographs and cartoon-type drawings. The October 1979 edition has a total of eight (8) pages. The January 1981 edition has a total of sixteen (16) pages including a supplement entitled "*The Professional Engineer.*" The supplement appears tc be an aid to job-seeking. It contains purely factual and technical information about such subjects as graduate studies in engineering, energy questions, the Canadian Congress of Engineering Students, the history and purpose of the Engineering Students' Society. In all the Professional Engineer Supplement consists of nine pages. Two of the respondents contributed to the report of the 13th Annual Congress of Engineering Students, namely, Tim Owen and Christopher Goulard.

17682 The Professional Engineer Supplement does not contain any of the material complained about by the Commission. Both the October 1979 and November 1981 editions contain a considerable volume of advertising copy.

17683 Rather than select a few examples the Board studied the newspapers in their entirety to examine the balance of the material contained in each and the context in which the material was presented. A brief description of each newspaper page-by-page will follow. The Evidence of witnesses is quoted where accurate and relevant to describe the material.

The October 1979 edition (Exhibit P1)

17684 The first page of this edition contains two articles, one short and factual entitled "*Building Expansion Underway.*" The other, the major article entitled "*Welcome Frosh,*" is presented as an information piece for first year students. It contains two references to women:

> (*You'll find that now that you've become an Engineer, women will be instantly attracted to you* (Column 1, paragraph 3).

and

> *I haven't said anything about the female frosh entering first year Engineering, because when I started, females in this college were about as scarce as intelligent Agros. Well I see things are changing (in our college I mean; there will never be intelligent Argos) and I'd just like to say to all you first year females out there "Welcome Aboard." The odds for you to find a man are fantastic. All you have to do is look at him the wrong (right???) way.*

> *Keep in mind however that quality is more important than quantity. Another thing to keep in mind are the comeons and lines used by upper year students. The mechanicals like to use the line "Would you like some help in Thermo? We can work in heat transfer!" and be a little wary when a Civil comes up to you with a sly grin on his face and says "TRUSS ME."*

17685 In the context of this newspaper the reasonable reader could presume that the message is that women are not interested in engineering per se but as a vehicle for gaining access to men. This material indicated a message which disparages and depreciates women by denying them individual motivation, identity or the capacity for self-determination. It affronts their dignity, their quality of being worthy.

17686 On page one there are two photographs, one of a semi-clad woman riding a horse, with the caption "*Godiva Mounts Agro President.*" The second photograph is of a pair of unclothed female breasts, with the caption "*FOUND — AT HELL DANCE: OWNER PLEASE CLAIM AT ESS OFFICE.*"

17687 An expert witness, a professor at Simon Fraser University teaching and researching in Philosophy and Women's Studies, was called by the Commisson. She was Dr. Susan Wendell who commented on this photograph in the specific context created by its caption. She stated under examination-in-chief:

> *Q. Now, you said there were two categories?*
>
> *A. That's right. I'd like to talk about another category of representations. These are representations which would not necessarily in any — I'm sorry, would not necessarily belittle, ridicule and affront the dignity of women in any context but which, in the context I mean — I'm including a number of things. First of all that these representations contributes to an overall consistent portrayal of women as mere bodies, as the sexual instruments of men for men's use in sexuality. For example, in the October third, 1979 issue in the bottom right hand corner we have a picture of women's breasts. Now, in itself, I don't think a picture of women's breasts ridicules, belittles or affronts the dignity of women but I feel that disembodied breasts in the sense of taking out of context of the whole human person and in addition being portrayed as being owned by someone, which further objectifies the breasts, that this contributes to the overall message of the publication that women are mere physical objects* (Evidence Volume II, 10 March 1982, pp. 105-106).

17688 On page two there is one serious advice article entitled "*Editorial — Communicating Partying,*" a presumably humorous article entitled "*No More Parking Tickets on Campus,*" and a cartoon. Dr. Wendell's evidence under examination on these was as follows:

> *On page two there is an article entitled No More Parking Tickets on Campus. This article purports to be talking about an investigation of the question of parking tickets. In it are three totally irrelevant references to, and I quote, "Fucking Blondes with Big Tits." This sort of thing, I think, contributes to the overall portrayal of women as mere objects or instruments of men's sexuality* (Evidence Volume II, 10 March 1982, p. 106).

17689 The cartoon on page 2 has the caption *And then . . . (SNIFF) . . . I had this TREMENDOUS Orgasim* [sic]." Dr. Wendell's testimony on this cartoon was as follows:

> *There's a cartoon on page two which portrays a woman in an extremely ridiculous and humiliating position. Her body has been apparently — I would say the cartoon asks us to believe that her body has been hideously deformed by an act of sexual intercourse and that the cartoon asks us to laugh at that consequence of suxual intercourse. I believe that the belittled and ridicules women as women and women's roles in sexuality. It depicts a woman not only so passive as to allow herself to be seriously harmed by an act of sexual intercourse but it asks us to laugh at the possibility of a woman being seriously harmed by sexual intercourse* (Evidence Volume II, 10 March 1982, pp. 101-2).

17690 Page three of the October edition contains advertising and cartoons. Page 4 contains an article "*President's Message*" by Brent Waldo and ten photographs of the table officers of the Engineering Students' Society including some of the respondents, namely, Brent Waldo, President; Tim Owen, External Vice President, and Scott McArthur, *The Red Eye* Editor.

17691 On page five there are two advertisements, one placed by the University Credit Union Limited and one by the University Bookstore. There is also a presumably fictitious job application form, a five line limerick and an article by the Internal Vice President inviting members of the Society to join "*The Rape and Plunder Squad*" and "*The Tank Crew.*"

17692 Dr. Dormer Ellis, an expert witness who has researched the subject of women in the Engineering Profession, in Engineering Colleges and who is herself a Professor of Enginering at the University of Toronto, was examined on her opinion of the limerick on page 5 of the 1979 edition.

> *MR. WOODARD, further examining:*
>
> *Q. Would you please answer the question?*
>
> *A. I find many parts of it very crude, vile I guess one would say.*
>
> *Q. Could you speak up a little, please?*
>
> *A. I'm sorry. I think many parts of it are very crude, coarse, vile, whatever you want to say, and very degrading to women, treating women as objects rather than people. They're not against women engineers. They're against women. Do you want an example or . . .*
>
> *Q. Sure.*
>
> *A. There's a limerick in one of these. It doesn't add much to literature I can tell you but . . . "There once was a lady from Guam who swallowed an atomic bomb. The first time that she'd made it the damn thing detonated and she found her cunt in a ditch." Now, the notion of a human being blown up and that parts of the anatomy are found in a ditch just doesn't strike me as funny at all. It strikes me as sickening.*
>
> *Q. And I take it what you're saying is there are many such representations in this magazine?*
>
> *A. Yes. The notion of death associated with sex and violence.*
>
> *Q. And how about women?*
>
> *A. Well, all addressed against women, yes.*

> *Q. And what is your general impression then of these copies that you have?*
>
> *A. Disgusting, if you want it in one word.* (Evidence Volume II, 10 March 1982, pp. 27-29).

17693 Under examination by Mr. Woodard, Dr. Wendell gave this evidence on the subject of the same limerick:

> *The theme of this poem it seems to me is quite similar to that of the cartoon I referred to in that we are being asked to laugh at the prospect of a woman being seriously physically harmed by an act of sexual intercourse and we are being asked to regard her body as something — as something to be ridiculed, something detachable from herself, something to be physically harmed and we are asked to find that humorous* (Volume II, 10 March 1982, pp. 102-3).

17694 Dr. Wendell's opinion evidence on the signficance of the fictitious job application form which is explicitly seeking a female employee and on the "*Rape and Plunder*" article were as follows:

> *On page five there's an alleged application for employment with The Red Eye Department of the College of Engineering of the University of Saskatchewan. The employment application asks for two sorts of things, physical characteristics and sexual habits, making it clear that the only thing of interest in this advertisement for an employee is that employee's sexual capacity and physical appearance. On that same page there is a very offhand reference to rape in which rape is clearly referred to in a very light manner, in fact the article is entitled Rape and Plunder. It talks about the Rape and Plunder Squad. Perhaps that's a group of people in the Engineering Society. I don't know, but the reference is certainly an offhand and tolerant and one would gather from the article the expectation is humorous reference to rape* (Evidence Volume II, 10 March, 1982, pp. 102-3).

17695 On page 6 half the page consists of advertising. There are three allegedly humorous pieces "Classified Farts" and "*A Priest's Racing Donkey*" and a piece defining "*Murphy's Laws*" The fourth short article entitled "*Orphans Robbed!*" called for the return of money obtained from beer bottles consumed at the Engineering-Nursing Wiener Roast for the Big Brothers and Sisters organizations.

17696 On page seven there are two cartoons, one article and one large advertisement. The article "*Law as it Should Be*" is allegedly humorous and sexual in nature. The central theme consists of a woman represented as real property outsmarting a man in a transaction of a sexual character. One cartoon represents three fish and the other, a quarter page cartoon, with a caption "*Poor Innocent Denis*[sic]*! What killed her?*"

17697 Dr. Wendell described and commented on the latter cartoon:

> *On page seven in the lower right hand corner is another cartoon. This cartoon at first look presents a picture of a man and woman apparently mourning over a coffin. The coffin says "S and M" on it and it's headed Poor — I think that word is Innocent Denise. What Killed Her? On the bottom are instructions, "Fold B over to A to find out" and then when one does that one sees a crude drawing of a penis. In this case I think the humor is supposed to lie in the idea that a woman has been killed by sexual intercourse. I can't imagine where else the humor is supposed to lie in the cartoon. Certainly the message of the cartoon is that she has been killed by a penis and one is asked to imagine how that might be done* (Evidence Volume II, 10 March 1982, p. 102).

17698 The last page (8) of the 1979 edition contains photographs and the caption "*Engineers in Action.*"

17699 The Board employed an objective test — what would the average reader find that this newspaper indicated or intended in determining whether or not the 1979 edition of *The Red Eye* violated S14(1). The Board had under the Code no duty to assess a relevant 'community standard,' this was not an obscenity trial.

17700 Many of the witnesses called by Counsel were students at the University of Saskatchewan. Their evidence did not address the specific editions complained of. They were qualified as witnesses by the Board because they held some representative capacity among student organizations on campus. Their evidence was of no relevance to the determination of the specific matters to be determined in category A or B.

17701 Section 31(1) of the *Code* requires simply that violation must be substantiated on the balance of probabilities and no more. Employing reasonable persons' understandings of the words — ridicule, belittle, affront the dignity of — in their plain and ordinary sense, the Board determined that the 1979 edition intended and indicated discrimination which violated S14(1) of the *Code* in the manner alleged in the Complaint.

17702 Taken as a whole there are no articles or representations which would neutralize the objective import of the material as ridiculing, belittling, and affronting the dignity of women because of their sex in the 1979 edition. Women are consistently the objects of ridicule because of their sexuality. Women are consistently "objectified" and treated as less than human, which belittles them as equal members of the human family. The material outlined affronts the dignity of women in the foregoing ways and furthermore, does so by consistently ridiculing them by deriving humour from the violent sexual degradation and physical destruction of women. This publication nowhere recognized the inherent dignity and equal inalienable rights of women not to be subjected to hatred, ridicule, belittling and affronting articles, notices, signs and symbols which diminished their worth as a class of people.

The January 1981 Edition (Exhibit P4)

17703 The first page of this edition contains a headline in bold print

> *WOMEN INFERIOR TO ENGINEERS*
>
> *That's right. Everyday women are significantly inferior to Engineers.*
>
> *For years the RED EYE has been accused of treating women as being INFERIOR. Well there's a reason for that. They are.*

SO ARE EVERYDAY MEN.
(our duty is to offend)

17704 This headline belittles women in the context of this campus newspaper. Three out of the four lines reinforce this message. The penultimate line does nothing to neutralize the message. The rest of page one contains warnings about the contents of the paper.

17705 On page two there are four short stories, poems or limericks and a half-page advertisement for a fund-raising auction. Sexual activity is the central theme in all of these.

17706 Page three contains one cartoon, a fictitious advertisement "*Win a Ph.D.!!!,*" a critique of the student newspaper, *The Sheaf*, "*Sheaf Sucks,*" a serious piece on "*Receivership,*" and two other articles "*Advertising for Sno Golf Dance Illegal*" and "*Engineers Lounge Converted to Pigstye.*" There is also a five line set of instructions centre page. An expert witness, a teacher and researcher in "Sociology and the Submission of Women," Professor Kathleen Storrie described this piece in her testimony:

> Q. *Excuse me, just before you were asked the question you were starting to look at the previous page there. Is there anything on that page that you wish to refer to?*
>
> A. *Sorry, yes. At the top of this, again I don't know. There's no page number. It's the third one in from the front there's a statement, "Is your girlfriend worn out? Check and see. Stick your thumb up her cunt and your middle finger up her ass. If you can snap your fingers she's worn out." That is a clear advice of, if one sees that, stick his thumb up her cunt and your middle finger up her ass, very clear depiction of if you can snap your fingers she's worn out, a very clear instruction. Again the assumption, is your girlfriend worn out, I assume it's a heterosexual situation and that, therefore, male engineers are being asked to behave in this way. Again, it's associating action — it's a very violent action that's being suggested and a very violent action perpetrated against a woman. Also suggesting that the only things that's important about a woman is whether or not she's in some kind of condition, I assume from the phrase "she's worn out," that her gentalia are there only for the use of male engineers, of engineers, I suppose* (Evidence, 3 May 1982, p. 32).

17707 Page four contains a one-quarter page advertisement, a cartoon, a satirical reprinted piece "*God and the E.P.A.*," and an article by the Editor, David Hoffer, entitled "*Fuck Off.*" This article is a diatribe against the Women's Directorate and Action Committee.

17708 Dr. Wendell's evidence on this article was as follows:

> *Oh, I would like to draw your attention to what might be regarded as an exception to the portrayal that I've said that these magazines present to us of women and that is that on page four of the January twenty-seventh, 1981 issue there is an editorial or rather a letter to the editor — I can't tell which because it's written by an editor. Anyway it's a letter addressed to women on campus which, when I first saw it I thought might at last be something in these publications which recognized women as full human beings with subjective experiences and the capacity to have their own desire and to act, but I note that this editorial which invites women to say what they like about men's bodies is entitled Fuck Off. Women are addressed as "you snotty-nosed bitches" and in the end in the request for information from women it's the request is this way: "Don't just sit there, you dumb broad. Get off your ass and do something," and the sign-off is "Fuck you all." I thought at first, as I said, that the reference was — that this letter perhaps at last recognized women as something other than sexual objects, as something other than objects of ridicule but on actually reading the letter and the tone of the letter I don't find that that's true* (Evidence Volume II, 10 March 1982, pp. 107-8).

17709 Between page four and page thirteen the Professional Engineer Supplement of *The Red Eye* is found. Page thirteen is the next page of *The Red Eye*, namely, the January 1981 edition (Exhibit P4). This page contains a one-quarter page advertisement, two drawings, three presumably humorous articles and three short limericks. Half of these derive humour from sexual activity. The limericks focus on women and sex and two involve beastiality involving women. These belittle and affront the dignity of women by dehumanizing them. The page also contains a chain letter. Dr. Wendell gave testimony in which she described and commented on this article.

> *In the January 1981 issue on page thirteen in the upper left hand corner is an alleged chain letter which is, we are told, which has been started with the hope of bringing relief to tired and unhappy wives. At the bottom of this chain letter there's a P.S. which reads, "At the time of this letter a friend of mine had received three hundred and sixty-five men." This is presumably in the mail. "They buried her yesterday and it took seven good undertakers thirty-six hours to get the smile off her face and two days to get her legs together so that they could close the coffin." The theme of this is similar to the cartoon I just spoke of in that we are asked to believe that a woman has been eventually killed by acts of sexual intercourse. Not only that but we are asked to believe that she enjoyed it and, as I said, that she died of it. I think all this material affronts the dignity of women and it would do so in whatever context it appeared.*
>
> Q. *Why is that?*
>
> A. *Because it asks us to laugh at the prospect of a human being being either seriously harmed or killed and in particular in virtue of her sexuality, in virtue of her sexual identity as a woman. It also ridicules and belittles women's role in sexual intercourse which is portrayed as so passive and so much the instrument of men that she would allow herself to be killed by sexual intercourse* (Evidence Volume II, 10 March 1982, pp. 103-5).

17710 On page fourteen there are two large advertisements and two columns of allegedly humorous definitions of words called "*The Red Eye Dictionary.*" This has 38 entries, seventeen of these make women the brunt of humour because of their sexuality.

17711 Dr. Wendell's evidence cites one example and the totality of her testimony on this aspect of the context of the 1981 edition merits quotation at some length since this expert's testimony was highly relevant to the Board in describing the context in which and nature of material which could discriminate against women in the fashion protected against by the Code. Dr. Wendell stated:

> *And there's also on page fourteen The Red Eye Dictionary. I noticed that in The Red Eye Dictionary the word "assault" is defined as "what every woman likes to be taken with a grain of," the clear implication being that assault of women is something that women like happening to them and it occurs in the context in which we are supposed to find this assertion humorous. I think that summarizes it so what I want to say about that second category is that actually the last thing from the dictionary might better be placed in the first category. I think in any context it would affront the dignity of women but aside from that, the other things that I've just mentioned as being in the second category would not necessarily affront the dignity of women but do so in the context of an overall portrayal of women as mere objects or instruments. I would like to add that there's a larger context for these magazines and that is that they purport to represent the engineering students of the University of Saskatchewan and their portrayal of women, it seems to me quite clear, does not seriously recognize the possibility that some engineers might be women, does not seriously recognise women's capacity to feel, to think, to experience, does not seriously recognize women's capacity to act on desires of their own but rather consistently portray women as mere objects for the use of men, and my personal opinion is that this sort of thing contributes to depriving women of opportunities to enter professions that have heretofore been mostly male professions in that it makes it difficult for women to anticipate the possibility that they will be taken seriously as fellow students and as colleagues in their profession. If the message that is conveyed to them by the student newspaper which alleges to represent women engineers is that women are seen as objects of ridicule, as sexual objects and not taken seriously as actors and havers of subjective experiences, of their own I think it makes it difficult for a woman to feel that it would be possible for her to be welcomed among the engineers as students and ultimately as colleagues* (Evidence Volume II, 10 March 1982, pp. 108-10).

17712 Page fifteen consists entirely of an advertisement. Page sixteen is the last page — it contains one cartoon and three photographs. The editorial staff also sign off. They include the printed signature of one of the respondents, Editor David Hoffer.

17713 The Board determines that on the balance of the probabilities the 1981 edition of *The Red Eye* violates Section 14(1) of the *Code* in that it intended and indicated discrimination in the manner complained about. The representations, cartoons and articles in this edition have the same offending characteristics as those in the 1979 edition. An objective test was applied by the Board employing the words of S14(1) in their ordinary, plain meaning. The Section is concerned with the effect of the respondents' action not their intent.

17714 Both the 1979 and 1981 editions contained no material which neutralized their discriminatory focus on women because of their sex or served to further any recognized social interest.

17715 The *Code's* Section 14(1) protects women against material which indicates discrimination in that it ridicules, belittles and affronts the dignity of women by tending to deny them equal status as members of the human family and thereby denying them rights guaranteed under the *Code*.

17716 The form which "ridicule" took in these editions frequently involved material containing the allegedly humorous description or depiction of the violent destruction of women's bodies through sexual intercourse.

17717 The manner in which women were "belittled" and had their dignity affronted because of their sex involved material suggesting that women in educational institutions are less than human; that they are inferior beings; that they are there to gratify male sexual desires; that they have no independent motivation or capacity to participate in social and intellectual activity. Women are belittled by being represented as mere objects, their dignity or quality of being worthy is depreciated. The material further affronts the dignity of women by trivializing and deriving humour from material which promotes sexual violence and the objectification of women. The material repeatedly represents women, in general, as less than human. In places the newspapers promote violent and demeaning treatment of women because of their sex.

17718 Legislation against the denial of human rights grew historically to combat the oppression for racial minorities. The analogy between racial and sexual discrimination was, therefore, a most useful one to the Board in its task of determining what would constitute a violation of the *Code* under Section 14(1).

17719 Professor Storrie gave evidence under cross-examination which seems most apposite to this analogy. She answered:

> *Q. You're saying that they can't say those things.*
>
> *A. In the context of depicting signs and symbols and materials which demean a group simply because of their particular gender or their race, for example, Jewish, if they were ethnic and Jewish people were depicted in a demeaning way I think society has to set some kind of limit because there are some very serious consequences when a group is continuously depicted in highly negative fashions, for example, this is the kind of way in which many Jewish people were depicted in Europe and there's a great deal of evidence to show that that consistent negative depiction of the Jewish people in language, in cartoons, in material printed created a climate in which six million people went to the ovens and so I think we should always take it seriously when people are depicted in this kind of way.*
>
> *Q. You support censorship then, do you?*
>
> *A. Well, certainly the legislation states . . .*
>
> *Q. Do you support censorship?*
>
> *A. If it's defined as a limit on material which is highly demeaning and belittling to women, yes, I would* (Evidence, 3 May 1982, p. 63-64).

Conclusion on the Evidence

17720 The test developed by Judge T. Taylor in *Singer* v. *Iwasyk and Pennywise Foods* (Unreported decision, Saskatchewan Human Rights Commission dated November 5, 1976) offered a useful test to the Board in making its determinations. This case involved a sign which ridiculed and affronted the dignity of the complainant on the grounds of race under the *Fair Accommodation Practices Act* R.S.S. 1965, C379. Judge Taylor stated:

> *The Commission feels it is proper to ask the following question: "Would the representation of blacks as childish, funny, emasculated, inferior, as described by the witnesses, indicate discrimination?"*
>
> *To put it another way, it is not only a question of whether a black person would feel humiliated or be insulted by this representation, but the question of whether or not such a person's rights to equal employment opportunities and even to non-discriminatory treatment in housing and public accommodation would be affected.*
>
> *It seems to us that to ask the question is to answer it. If a stereotypical image of a certain class of persons as incompetent, childish and funny is allowed to be displayed, the opportunities of members of the class for responsible jobs and to obtain rights on an equal footing with the majority class grouping are endangered.*

17721 Does the representation of women as objects of violence and sexual gratification, as incapable of independent thought and action, as inferior, as funny indicate discrimination or the intent to discriminate? It seems to us that to ask the question is to answer it.

17722 A stereotypical image of a certain protected class of persons, namely women, is presented when they are consistently depreciated as ridiculous objects and when sexual violence and other forms of discriminatory depictions and descriptions are directed at them because of their sex. The class consisting of this gender is then ridiculed, and belittled and their dignity affronted. Discrimination like this jeopardizes their opportunity to obtain equality rights including employment, education and security of their persons on an equal footing with the dominant gender grouping.

17723 The effect of such representations is to reinforce and legitimate prejudice against women. It prolongs the existence of hangovers of prejudice against equal female participation in education, work, aspects of social life and the professions.

17724 This material promotes a consistent image of women as less than human. Once a protected class, in this case women, is represented as a less than equal member of the human family with impunity the grave evil exists that they may be treated as such. Material of the kind in these newspapers serves to perpetuate a social climate discriminatory to women who are already targets of manifold discrimination and horrible violence. No social interest is served by tolerating the free expression of such material.

17725 The Board determined that 1979 and 1981 editions of *The Red Eye* violated Section 14(1) of the *Saskatchewan Human Rights Code* in the manner complained about by the Complainant in that they ridiculed, belittled and affronted the dignity of the women of Saskatchewan on account of their sex.

IV. CATEGORY B

17726 The questions the Board has placed in Category B are those which require the Board to determine whether or not the respondents published the 1979 and 1981 editions of *The Red Eye* which they owned, or controlled or distributed.

17727 The Respondents in this Complaint consist of the following individuals: Brent Waldo, Tim Owen, Christopher Goulard, David Hoffer and Scott McArthur and the unincorporated body known as the Engineering Students' Society.

17728 We have three categories of Respondents:

1) *The Engineering Students' Society* in 1979 and 1981;

2) *Presidents of the Engineering Students' Society* at the material times: Brent Waldo 1979, Tim Owen 1981, and Christopher Goulard at the time the complaint was filed in April 1981;

3) *Editors of The Red Eye* at the material times: Scott McArthur for the 1979 editions and David Hoffer for the 1981 edition.

17729 The Board examined the responsibility for each violation by each category of respondent in turn. The Commission alleges: i) that the Respondents published the 1979 and 1981 editions; ii) that the Respondents owned, or controlled the 1979 and 1981 editions; iii) that the 1979 and 1981 editions were distributed throughout the University of Saskatchewan campus by the Respondents.

The Engineering Students' Society

17730 The Commission argued that the Society was an entity capable of being complained against under Section 14(1) of the *Code*. Counsel for the Society argued that the Society was not a suable entity because it was not a "person" capable of being sued under Section 14(1) and Section 2(m) of the *Code*.

17731 The Word "person" is defined in Section 2(m) of the *Code* as follows:

> *(m) "person", in addition to the extended meaning contained in The Interpretation Act, includes an employment agency, employers' organization, occupational association or trade union;*

The Interpretation Act R.S.S. 1978 c-1, Section 19 states:

> *. . . person includes a corporation and the heirs, executors, administrators or other legal representation of a person.*

17732 Counsel for the Society made this submission for the first time in Written Argument dated 6th of May 1983. The Board, Counsel for the Commission and Mr. Christopher Goulard, President of the Society at the time of the complaint had been led to believe that Mr. Harradence represented the Engineering Students' Society from the outset of the formal inquiry. The first evidence of this formal client/solicitor relationship was given to the Board by Mr. Goulard on the 21st day of January 1983, the first day of hearings, when he asked the Board to adjourn precisely so that the Society could be represented by this Solicitor. Furthermore, the style of cause of both Writs of Prohibition applied for by Counsel for the Society indicated that he was acting for the Engineering Students' Society. Counsel for the Society appears to make a submission which both approbates and reprobates. He appears to want to claim the benefits and then disclaim the liabilities of a status.

The Law: Is an "Unincorporated Association" a "person" under the Code?

17733 The testimony and the Board's own inquiries revealed that the Engineering Students' Society, University of Saskatchewan was not an "incorporated association" at the material times. Does this, therefore, mean that it is not an entity against which a complaint under S14(1) of the *Code* can be made? The basis of the Society's submission appears to be that an "unincorporated association" should not be construed as falling within the genus of a "person" for the purposes of complaints under the *Code* and in particular Section 14(1).

17734 E.A. Driedger states the following principle of construction:

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament* (The Construction of Statutes, Butterworths, Toronto 1974, p 67)

17735 The Board has already adopted this principle in its construction of words under Category A questions. The scope of the meaning of the word "person" in the *Code* calls for an unrestricted rather than a restricted meaning of the word to be construed. This is demonstrated by the range of meanings of the word expressly employed in the *Code*.

17736 Section 2(m) states that the definition of "person" "*includes a corporation*" under Section 19 of *The Interpretation Act*. In Section 2(m) itself "person" includes an "*employment agency, employers organization, trade union,*" and "*occupational association.*" "*Occupational associations*" are further defined in Section 2(k) in a particularly instructive way as follows:

> *(k) "occupational association" means any organization whether incorporated or otherwise, in which membership is a prerequisite to carrying on any trade, occupation or profession, but does not include a trade union or employers' organization;*

17737 In the view of the Board the legislative draftsperson by juxtaposing "*incorporated*" with "*or otherwise*" in Section 2(k) demonstrates that an "*unincorporated association*" is contemplated by the legislature as falling within the statutory definition. An "*occupational association*" which is not incorporated must be unincorporated: that is presumably the fashion in which it is "*otherwise.*"

17738 The principle of language known as the "ejusdem generis" doctrine is a good starting point for assessing whether or not it would be internally consistent with Section 2(m) of the *Code* to construe the word "person" so as to include "unincorporated associations" such as the Society. The five alternative interpretations of the word "person" in the *Code* offer a wide range of similar entities by way of example rather than as an exhaustive list. This is common drafting practice. These examples create a "genus;" the genus is the "organization" as a "person." All the examples are of organizations of various kinds. "Unincorporated Associations" are clearly a form of "organization" and this species is implicitly recognized in the interpretation offered in Section 2(k). The creation of a genus such as "organization" as "person" is normally intended to extend the operation of the enactment to all particular entities which are within the genus created including, for example, such species as "unincorporated associations."

17739 If we read the *Code* as a whole and construe the word "person" in the context of the entire Act the conclusion that "person" includes "unincorporated associations" is further strengthened. The interpretation Section (2) of the *Code* used the word "*includes*" in Section 2(m) as does the *Interpretation Act* in Section 19. The word "*includes*" has the effect of extending rather than restricting the normal meaning of the words in questions. Lord Justice Cotton stated:

> *It was argued that looking to the terms of this enactment, even if the place in question were a street, it is part of a turnpike road and therefore not a street within Section 68. My opinion is to the contrary. The interpretation clause is not restrictive. It does not say that the word "street" shall be confined to any highway not being a Turnpike road, but "shall apply to and include" any highway not being a turnpike road. That is enlarging and not restricting the meaning of "street"* (Nutter v. Accrington Local Board (1879) 4 Q B 375, p 385)

17740 A restricted construction of the word "person" in terms of the objects of the *Code*, the intent of the legislature and in the circumstances with reference to which it is used which excluded "unincorporated associations" from liability under the *Code* would lead to both inconsistency and absurdity. It might prevent unincorporated bodies such as racist organizations being complained against under the *Code*. It can hardly have been the legislature's intent to exclude one species of "unincorporated associations" from the operation of the *Human Rights Code* but to include all other forms of organization including "unincorporated associations" falling within the genus.

17741 Counsel for the Society used the word "suable" in his submission. To sue is to bring an action, suit or other civil proceeding. Civil proceedings fall within the realm of "private law." If this complaint were one involving the enforcement of individual obligations the Board would have had to accept the Society's submission (see inter alia *Wallace v. Order of Railroad Telegraphers* (1905) 5 W.W.R. 787, *Metallic Roofing Company of Canada v. Local Union No. 30 Amalgamated Sheet Metal Workers International Association* (1903) 5 O.L.R. 424, 9 O.L.R. 171 (C.A.), *Smith v. Falk* (1940) O.W.N. 271). Human Rights legislation including the *Code* is, however, public law. A public agency, namely, the Commission has carriage of complaints on behalf of the members and classes of the public to serve the public interest as set out in the objects of the *Code*.

17742 Nonetheless, the law on the liability of "unincorporated bodies" under *Human Rights Codes* is complicated. There are three recent Ontario Board of Inquiry cases which have addressed the question of the liability of unincorporated bodies under the Ontario *Human Rights Code* 1980. These are *Re: Cummings and the Ontario Minor Hockey Association* (1980) 26 O.R. (2nd) 7, *Rawala and Sousa v. DeVry Institute of Technology* (1982) 3 CHRR, D/1057, and *Susan Ballantyne v. Molly "N" Me Tavern* (1983) 4 CHRR D/1191.

17743 In the Cummings decision the High Court was silent on whether the respondent association, an unincorporated body, could be the subject matter of proceedings. On appeal, the Ontario Court of Appeal expressly addressed this issue and held that as an unincorporated association the *Ontario Minor Hockey Association* was not an entity against which a complaint could be brought under the provisions of the *Ontario Human Rights Code* operative at the relevant time. The *Ontario Minor Hockey Association* was not a "person" as defined by the *Ontario Human Rights Code*.

17744 The *DeVry* decision and the *Susan Ballantyne* decision were distinguished on other grounds from the Cummings decision but the Boards appear to have felt bound by this particular aspect of the decision, namely, that "unincorporated bodies" were not "persons" under the *Ontario Human Rights Code*.

17745 The critical provision was the construction of the word "person" as employed in the interpretation Section of the *Ontario Human Rights Code* R.S.O. 1972 c.119 s.3, Section 19(h). This subsection provides as follows:

> *(h) "Person," in addition to the extended meaning given it by the Interpretation Act, includes an employment agency, an employers organization and a trade union.*

Section 30(28) of the *Ontario Interpretation Act* provides as follows: "*Person includes a corporation . . .*" etc.

17746 The similarities with the *Saskatchewan Code* are considerable but not exact, in a very material way. The legislation can be distinguished as follows: the *Ontario Code* provisions do not include the example of "occupational association" as in Subsection 2(m) of the *Saskatchewan Code* of the further and more illuminating interpretation of "occupational association" in Subsection 2(k) which means an organization "*whether incorporated or otherwise.*" The recognition that "unincorporated associations" may be members of the genus of organization deemed to be "persons" under the *Code* has already been made. The Saskatchewan legislation is clearly distinguishable from the *Ontario Code*. The Board, therefore, does not feel itself persuaded to follow the restricted construction of the word "person" which Ontario Courts and boards have adopted. These tribunals clearly determined that the unrestricted construction would be a usurpation of the legislative power under the guise of interpretation. This would not be so in this case.

17747 The Ontario legislature revealed its intent to cure the gap in its *Code* and amended it to include "unincorporated" bodies within the interpretation of "person" in the current provisions of the *Ontario Human Rights Code* 1981. The interpretation Section, Section 45 replaces Section 19 and reads as follows with respect to the interpretation of the word "person."

> *(c) "Person," in addition to the extended meaning given it by the Interpretation Act includes an employment agency, an employer's organization, an* unincorporated association [our emphasis], *a trade union, a partnership, a municipality and a board of police commissioners established under the Police Act R.S.O. 1980 cc219.381*

17748 This cures the defect in the *Ontario Code* which defeated the legislative's intent to proscribe the discriminatory conduct by unincorporated bodies rendered possible by the restricted construction of the *Ontario Code* Section 19(h) in the foregoing cases.

17749 The Board, therefore, rejects the submission that an unincorporated association such as the Society cannot be complained against and found in violation of Section 14(1) of the *Code*.

V. EVIDENCE

1. The Engineering Students' Society

17750 The Commission had the onus of establishing on the balance of probabilities that the Respondent Society published the 1979 and 1981 editions being a newspaper which they owned or controlled or distributed.

17751 In making its determinations of responsibility for these actions a Board of Inquiry under Section 31(1) of the *Code* may:

> *". . . determine its own procedure and may receive and accept any evidence and information on oath, by affidavit or otherwise that in its discretion it considers fit and proper, whether admissible as evidence in a court of law or not . . .*

17752 Counsel for the Society led no evidence to contradict the allegation that the Engineering Students' Society was responsible for the publication or distribution of the 1979 and 1981 editions of *The Red Eye*. Some self-contradictory evidence by Mr. Goulard was offered.

17753 The 1979 edition (Exhibit P1) contains on its masthead on the first page the heading "*The Red Eye — Published by the Engineering Students' Society — University of Saskatchewan, Saskatoon, October 3, 1979.*" On page three there is an article "*President's Message*" by Brent Waldo. It is clear from this article that he claims to be President of the Engineering Students' Society. Photographs of the Table officers of the Society appear on this page. They include Brent Waldo above the caption "*President.*"

17754 The 1981 edition (Exhibit P4) contains an article on page 11 entitled "*Inside the ESS.*" This article sets out the history of the Society, its budget and activities. For example, paragraph 1, column 1 states:

> *The Engineering Students' Society was formed in 1919 to fulfill the social needs of the students enrolled in the Col-*

> *lege and has existed without interruption ever since. Although membership in the E.S.S. is not mandatory, most students over the years have belonged to it. This year more than 900 students — a record 85 per cent — are society members. There are now 47 elected and appointed members on the E.S.S. council, 10 of which are executive positions.*

17755 In paragraph 2, Column 5 on page 11 under the heading "*Light Hearted Jest*" the following statements are made:

> *Distributed weekly through the college is ENG-INFO, which informs the students of all the activities going on in the College and of how he or she can get involved. Other E.S.S. publications include the College yearbook, the E.S.S. phone list, and last but not least the Red-Eye, the newspaper in which undergraduate engineers write articles of light hearted jest directed primarily to our campus rivals, the Agros and The Sheaf.*

These assertions were not contradicted by evidence led by the Society despite ample opportunity to do so. The Board considered the justice and reasonableness of drawing adverse inferences in these circumstances. We were guided by the following principle:

> *Mere silence per se does not constitute an admission or an adoption of liability but such silence when coupled with material loss or prejudice to the party who should have been informed that liability was not accepted will operate as such* (see Sopinka, John and Sydney Lederman, *The Law of Evidence in Civil Cases*, Butterworths, Toronto, 1974, p. 144).

17756 The Board concluded that it would be reasonable (see *McKenzie v. Commer* (1973) 44 DLR (3) 473) to expect a reply from the Society to rebut these allegations. The newspapers themselves and the conduct of the Respondents supported the submission of Counsel for the Commission that on the balance of probabilities the Society published, controlled or distributed the 1979 and 1981 editions. This, the required standard of proof, has been described as follows by the Supreme Court:

> *Such a preponderance of evidence as to show that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts* (*Clark v. The King* (1921) 61 SCR 608 at 616).

17757 The direct evidence of Mr. Christopher Goulard, who stated that he was President of the Engineering Students' Society between March 1981 and March 1982 (see Question 12, Evidence, 21 April 1983, p. 70) is also highly relevant. Under Examination-in-Chief he stated:

> Q. *I see. Insofar as these particular issues of The Red Eye are concerned, could you please tell the Board what is The Red Eye?*
>
> A. *Well, the Red Eye is a rag produced by the U. of S. Engineering Students' Society.*
>
> Q. *I see, and is this a traditional sort of journal or publication that engineers in the University of Saskatchewan and elsewhere publish?*
>
> A. *Well, at the University of Saskatchewan and most of the other engineering universities that I'm aware of in Canada also have a red rag.*
>
> Q. *As a matter of fact one of them is known as The Red Rag? Is it not?*
>
> A. *I think so. Vancouver.*
>
> Q. *Yes, and what is the purpose of the publication of these particular papers or sheets that are sent out and published by the Engineering Students' Society?*
>
> A. *It's kind of a tradition. I think mostly they're just there to get members of the College involved in the activities of the College, and just, I guess, some sort of humor or something* (Evidence, 21 March 1983, p. 70-71).

Under cross-examination this Respondent further stated:

> Q. *And it was at that time broadly understood, acknowledged and notoriously known that these were publications of the Engineering Students' Society, was it not?*
>
> A. *Yes, it was generally known* (Evidence, 21 April 1983, p. 79).

17758 The combination of real evidence, admissions and testimony in this case are such that the Board determined on the balance of probabilities that the Engineering Students' Society published the 1979 and 1981 editions of *The Red Eye*.

17759 A lack of ability to exercise control over the publication by the Society was argued by Counsel for the Society to exculpate it. Several points were made in cross-examination of Christopher Goulard.

> Q. *What sort of control did the Engineering Students' Society exercise over the publishing of The Red Eye?*
>
> A. *We tried to exercise some but it was the members of the editorial board or whatever, they didn't really have, you know, the editorial staff or The Red Eye staff they called it, basically didn't take too much direction.*
>
> Q. *Do you recall what the budget for The Red Eye was during the year that you were president?*
>
> A. *No, because they, as I said, they kind of — they acted on their own and in fact they got their own advertising in there so we didn't — they always screamed freedom of the press whenever we tried to get them to tone things down or to do something we wanted, they'd always cry freedom of the press and the editor might quit and all this other stuff so there wasn't a heck of a lot we could do about it and they had their own funds because of the advertising so . . .*
>
> Q. *Now, was the editor of The Red Eye a member of the executive committee of the Engineering Students' Society?*
>
> A. *No.*
>
> Q. *Was he appointed by the Engineering Students' Society?*
>
> A. *He was appointed.*
>
> Q. *By the Engineering Students' Society?*
>
> A. Yeah, the counsel [sic] which is all the members.
>
> Q. And how would that appointment take place?
>
> A. There would be a deadline. It would be promoted that these positions were open on counsel [sic] and one of them was Red Eye editor and anybody could put their name forward, their application forward and then the counsel [sic] would then take all these and decide who would get it.

> Q. *Who was this counsel* [sic]
>
> A. *Well, that's all of the — any member of the Engineering Students' Society could go and vote. Every once a week.*
>
> Q. *So then the editor of The Red Eye would be voted into office in the same way as you would have been. Is that correct?*
>
> A. *No. Well, no.*
>
> Q. *Okay, what's the difference?*
>
> A. *Oh, okay, yeah, okay.*
>
> Q. *Democratic vote?*
>
> A. *If you get right down to it, yes.*
> (Evidence, 21 April 1983, pp. 86-87).

17760 This testimony explains that the editor of *The Red Eye* is an elected official of the Council of the Society. Goulard indicated that the Society tried to exercise "control" over *The Red Eye*. That they failed to significantly influence editorial policy in one instance is largely irrelevant. Furthermore, there is no evidence that they attempted to repudiate the newspaper as a publication of the Society thereafter. This and other evidence (see also Evidence, Volume I, 9 March 1982, p. 90 and 93) indicated a convention in the Society that some form of control over editorial policy was customary and theoretically possible by the Society through its President. The Board, therefore, felt justified in determining that the most probable of the possible views of the facts would allow us to infer "control" by the Society of the newspapers' editions in 1979 and 1981.

17761 The issue of distribution must also be determined. Counsel for the Society asked Goulard (see Evidence, Question 18, 21 April 38):

> Q. *Yes, what is the purpose of these particular papers or sheets that are sent out and published by the Engineering Students' Society?*
>
> A. *It's kind of a tradition . . .*

The answer implicitly confirms that the Society not only published but in addition "*sent out*" the paper which appears to be part of the process of distribution. The volunteer typesetter for the Student Union printshop at the material times, Terry Pugh, gave evidence of his personal knowledge of the extensive distribution system on the University campus used for the 1979 edition (see Evidence, Volume I, 9 March 1982, pp. 154-6).

17762 Under examination a professor at the University, Kathleen Storrie, also testified to her personal knowledge of extensive distribution of the 1979 and 1981 editions on the University campus (see Evidence, 3 May 1982, pp. 10-11).

Conclusion on the Evidence Against the Society

17763 The Board, therefore, finds the Commission has discharged the onus of proving on the balance of probabilities that the Society published, controlled or distributed the 1979 and 1981 editions of *The Red Eye* newspaper. The Board has already found that these editions violated Section 14(1) of the *Code* by ridiculing, belittling and affronting the dignity of women because of their sex. The Board, therefore, concludes on all evidence that the Engineering Students' Society violated the *Code* in the manner complained of by the Commission on April 14, 1981.

2. The Evidence Against Presidents of the Engineering Students' Society

a. Brent Waldo

17764 The Commission submits that Brent Waldo was President of the Engineering Students' Society from March 1979 to March 1980. Brent Waldo did not appear or submit any defence to contradict this submission. Can the Board, therefore, presume that he was President at this time and as such that he was ultimately responsible for the publication, control and distribution of the 1979 edition?

17765 Using an analogy from the law of defamation that adverse inferences may be drawn when a person's name appears at the foot of an article, it is important to note that Brent Waldo's name so appears at the foot of an article on page 4 of the 1979 edition entitled "*President's Message*." Furthermore, Christopher Goulard identified Waldo from a photograph on the same page as President of the Society at the material time (see Evidence, 21 April 1983, page 80, questions 13-18).

17766 In addition, Karen Maclachlan, a Human Rights Officer employed by the Commission stated under direct examination by Mr. Woodard:

> Q. *Please continue on.*
>
> A. *Mr. McArthur did indicate to me that he was the editor of The Red Eye during the period of time when this publication was printed. He confirmed for me that as the editor his responsibilities were to typeset, publish, gather advertisements and distribute this newspaper. He also indicated to me that it was the president of the Engineering Students' Society who was reponsible for items printed in the publication and he further indicated that this had been a Mr. Brent Waldo up until that time. He also indicated to me that Brent Waldo was out of the province for approximately one year* (Evidence, Volume I, 9 March 1982, p. 90).

17767 This description of the President's function was not attacked by Counsel for the Society in cross-examination. The Board made the assumption that a "legal person" such as an unincorporated body normally acts through its officers. Its acts are their acts.

Conclusion on the Evidence

17768 The Board concludes that Brent Waldo violated Section 14(1) of the *Code* in the manner complained of by the Commission.

b. Tim Owen

17769 The commission submits that Tim Owen was President of the Society from March 1980 to March 1981. This was not denied. No evidence was led to contradict the statements of Karen Maclachlan (see Evidence, Volume 1, 9 March 1983, p. 90 and 93) in which she states that she was told by Scott McArthur, editor of the 1979 edition, that the President of the Society was ultimately responsible for what was "printed" in the 1981 edition of *The Red Eye*.

Conclusion on the Evidence

17770 The Board concludes that Tim Owen violated Section 14(1) of the *Code* in the manner complained of by the Commission.

c. Christopher Goulard

17771 The Commission named Goulard as Respondent because he was President of the Society at the time the complaint was filed on the 14th of April 1981. This he did not deny. He was not President of the Society or editor of *The Red Eye* at the material times of the publication and distribution of the 1979 or 1981 editions. Can he, therefore, be said to have published, controlled or distributed either of the editions?

Conclusion on the Evidence

17772 The Society as an unincorporated body is a "person" who has an ongoing existence. *The Red Eye* boasts that the Society has apparently existed "*without interruption since 1919.*" Table officers come and go and must be responsible for the acts of the Society while they are the "minds and management" of the entity. In answer to our question above, it seems both unreasonable and illogical to hold an individual accountable retrospectively for the acts of his predecessors. Goulard's only link to the violations complained of is that at the time of the complaint he happened to be President of the Society. Hence, it is only in this capacity that he would be held responsible for the acts, namely, publication, control, distribution of the Society. While the "person," the Engineering Students' Society, is liable for the violations of Section 14(1), the Board does not find that the Commission has proved on the balance of probabilities that Goulard violated Section 14(1) in the manner complained of by the Commission on April 14, 1981.

3. Evidence Against the Editors of *The Red Eye* 1979.

a. Scott McArthur

17773 The Commission submits that Scott McArthur was editor of the 1979 edition. At no point in the proceedings was this denied. McArthur's photogrpah appears in the 1979 edition with the caption "*Red Eye Editor*" underneath it. Ms. Maclachlan's testimony (see Evidence, Volume I, 9 March 1982, p. 10) also confirmed this and was not contradicted. Terry Pugh's evidence also confirms Scott McArthur's involvement with the 1979 editions (see Evidence, Volume I, 9 March 1982, pp. 153-154 and p. 156). No attempt to discredit this aspect of this witness' testimony was made in cross-examination.

Conclusion on the Evidence

17774 The Board concluded on the evidence before it that the Commission had established on the balance of probabilities that McArthur was the editor of the 1979 edition. Presumptions from the law of libel are useful. Everyone who takes part in the publication of a libel including editor (*R vs. Dover* (1663) 8 How. St. Tr. 547) and *Watts v. Fraser* (1835) 7 C+P 369) is liable. The evidence, fortified by this unrebutted presumption, is sufficient on the balance of probabilities to allow the Board to determine that Scott McArthur violated Section 14(1) of the *Code* in the manner complained of by the Commission. He was responsible as editor for publishing, controlling and distributing the 1979 edition.

b. David Hoffer

17775 The Commission submits that David Hoffer edited the 1981 edition. At no point in the proceedings was this denied. Hoffer's name appears at the foot of an editorial diatribe against women's organizations entitled "*Fuck Off*" on page 4 of the 1981 edition. His name also appears on the final page of the newspaper under the heading "*We're done! This is it, the last page. Thankx to everyone who helped out,*" David (Jack) Hoffer, Ed. Mr. Goulard also testified that Hoffer was editor of *The Red Eye* (Evidence, 23 April 1983, p. 81).

Conclusion on the Evidence

17776 The Board determines that the Commission has established on the balance of probabilities that Hoffer edited the 1981 edition. In this capacity he published, controlled and distributed the 1981 edition and thus he violated Section 14(1) of the *Code*.

ORDERS

17777 1. The Board hereby declares that the 1979 and 1981 editions of *The Red Eye* newspaper which was published, controlled and distributed by the Engineering Students' Society, University of Saskatchewan and the other Respondents with the exception of Christopher Goulard violated Section 14(1) of the *Saskatchewan Human Rights Code*. The form of these violations is not protected by the freedom of expression. The violations discriminated against women by ridiculing, and belittling them, and affronting their dignity because of their sex.

17778 The Board reiterates that this material in promoting a consistent image of women as less than human is a source of grave evil in our society. Once a class of people is presented as less than equal members of the human family with impunity the class may well be treated as such. Material of the kind in these two newspapers perpetuates a social climate which is discriminatory to women. Women are already targets of manifold discrimination and horrible violence. No social interest is served by tolerating the free expression of such material.

17779 2. The Board orders that there be no further dissemination of the 1979 and 1981 editions of *The Red Eye*.

17780 3. The Board orders that the Engineering Students' Society and the other Respondents do publish copies of this Order in full and without comment in sufficient numbers for each member of the E.S.S. in the 1984-5 year or 900 copies whichever is the greater. That these copies be disseminated in a like manner to *The Sheaf* and *The Red Eye* in distribution boxes throughout the University of Saskatchewan campus. This publication and distribution shall be simultaneous with the next edition of *The Red Eye*. This will be supervised by Saskatchewan Human Rights Commission Staff.

17781 4. The Board orders that all members of *The Red Eye* Staff and the Society's executive for the 1983-4 academic year and the 1984-5 academic year attend workshops arranged by the Saskatchewan Human Rights Commission. Compliance with this order is to be the responsibility of the Editor of *The Red Eye* and President of the Society at the material time. Non-compliance shall be reported by the Commission to the Dean of Engineering, the Senate of the University of Saskatchewan and the Discipline Committee of the Council of the University of Saskatchewan.

17782 5. The Board orders the Engineering Students' Society and other liable Respondents to pay the following costs since the Board determines that the Society put the Commission to unnecessary and unreasonable expense on the following days:

a. One half day's counsel fee for:

21 January 1982	$120.00
18 October 1982	$120.00
27 January 1983	$120.00
TOTAL	$360.00

b. Provable expenses in relation to the attendance of witnesses on the 21st of Janaury 1982, 18th of October 1982, and 27th day of January, 1983.

17783 The Board declares itself seized of this matter until such time as it is satisfied that a reasonable amount is agreed, or in the event of disagreement the Board will determine the amount.

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / EMPLOYMENT / AGE
Court of Queen's Bench
City of Moose Jaw v. Roy Day

Volume 5, Decision 373 **Paragraphs 18592 - 18626** **July/August, 1984**

Court of Queen's Bench Decision under the
SASKATCHEWAN HUMAN RIGHTS CODE

The City of Moose Jaw
and
The Moose Jaw Firefighters Association
Local 553
Appellants

v.

Roy Day
Respondent

Date:	April 13, 1984
Place:	Moose Jaw, Saskatchewan
Before:	Matheson, J.
Appearances by:	J.C. Zimmer, Counsel for the City of Moose Jaw R.G. Hagan, Counsel for The Moose Jaw Firefighters Association M.C. Woodard, Counsel for Roy Day and the Saskatchewan Human Rights Commission

Summary: *The Court allows the appeal by the City of Moose Jaw and the Moose Jaw Firefighters Association from the decision of a Board of Inquiry which found that Roy Day was discriminated against when he was forced to retire from his position as a firefighter at age 62.*

The Court rules that the Board of Inquiry applied the wrong test to determine whether being less than 62 years of age was a bona fide occupational qualification for the position of firefighter, because it did not properly apply the test set out by the Supreme Court of Canada in the Borough of Etobicoke decision.

The issue in this case is whether an employer and a union can agree through collective bargaining to a mandatory retirement age younger than 65. The available defence for such a practice is that an age younger than 65 is a bona fide occupational qualification for the position. In its decision on the same issue, the Supreme Court of Canada stated that to establish that an age younger than 65 is a bona fide occupational qualification the employer must show there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large."

The Court finds that the Board of Inquiry in this case erred because, while it used this Etobicoke test, it also used the test set out in the American case Usery v. Tamiami Trail Tours Inc. The Court finds that the Tamiami test requires a demonstration of "intolerable" risk of employee failure rather than "sufficient" risk of employee failure and that this is different from the Etobicoke standard. By applying the Tamiami test, the Court rules that the Board of Inquiry erred in law.

The Court finds that the evidence presented by the appellants meets the test of establishing sufficient risk of employee failure to justify setting a mandatory retirement age younger than 65.

The appeal is allowed.

18592 In a complaint revised as of March 2, 1982, the Respondent, Roy Day, alleged that he had been the subject of discrimination by the Appellants by virtue of his age, contrary to The Saskatchewan Human Rights Code (the "Code"). A Board of Inquiry (the "Board") was established to inquire into the complaint. In Reasons for Decision dated November 1, 1983, the Board concluded that the complaint was well founded. The Appellants have appealed from that conclusion.

I

18593 Roy Day was employed continuously by the City of Moose Jaw (the "City") as a firefighter from 1947 until February 29, 1980. Since at least 1972 the terms and conditions of employment of firefighters by the City have been governed by a collective bargaining agreement with the Respondent, the Moose Jaw Firefighters Association Local 553 (the "Union"). The 1974 collective bargaining agreement made provision for the gradual reduction of the mandatory retirement age of firefighters from age 65 to age 60. In 1976 the mandatory retirement age was to be reduced from 65 to 64 years; in 1978 from 64 to 63 years; in 1980 from 63 to 62 years; in 1982 from 62 to 61 years; and in 1984 from 61 to 60 years.

18594 Roy Day attained the age of 62 years in April, 1979, and on February 29, 1980, he was required to retire as a firefighter. Although Day had twice applied for an extension of his normal retirement beyond the date specified in the collective bargaining agreement, both the City and the Union rejected the applications for extension.

II

18595 Section 16 of the Code prohibits discrimination in employment, and s.s. (1) thereof provides:

> "16.-(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term or condition of employment, because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin."

18596 The term "age" is defined in s. 2(a) as meaning:

> ". . . any age of eighteen years or more but less than sixty-five years."

18597 Subsection (7) of s. 16 of the Code sets out a proviso to the prohibition against discrimination in employment:

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> "16.-(7) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, physical disability or age do not apply where sex, physical ability or age is a reasonable occupational qualification and requirement for the position or employment."

18598 Section 32 of the Code makes provision for an appeal from any decision or order of a board of inquiry, and s.s. (4) prescribes the jurisdiction of the appellate court:

> "32.-(4) Where an appeal is taken under this section, the judge shall determine any question of law relating to the appeal and may affirm or reverse the decision or order of the board of inquiry or remit the matter back to the board of inquiry for amendment of its decision or order."

III

18599 In *Ontario Human Rights Commission et al v. Borough of Etobicoke* (1982) 132 D.L.R. 14, (3 C.H.R.R., D/783, a seven member panel of the Supreme Court of Canada unanimously reversed the decision of the Ontario Court of Appeal which had upheld the majority decision of the Ontario Divisional Court allowing an appeal from a decision of a board of inquiry established pursuant to the Ontario Human Rights Code. The board of inquiry had concluded that the municipality had discriminated against two firefighters because of age. The *Etobicoke* case involved virtually the same issues as were raised by the complaint of Roy Day.

18600 The collective bargaining agreement in *Etobicoke* made provision for mandatory retirement of firefighters at age 60. The Ontario Human Rights Code prohibited discrimination in employment on the basis of age, which was defined as "any age of 40 years or more and less than 65 years." The proviso in the Ontario Human Rights Code stated that the prohibition did not apply to a "*bona fide* occupational qualification and requirement for the position or employment."

18601 The Code utilizes the phrase 'reasonable' occupational qualification, instead of '*bona fide*' occupational qualification, and the differing phraseology was noted by the Board when adopting the reasoning of Hamilton, J. in *Manitoba Human Rights Commission and John W. Finlayson v. City of Winnipeg* (1982) 135 D.L.R. 641 (3 C.H.R.R., D/902). The Manitoba Human Rights Code also utilizes the word 'reasonable' rather than '*bona fide*', and the Board concluded that the proper test is whether the employer can justify that age (60) is a reasonable, or reasonably necessary, retirement age for this type of employee. No issue has been taken with this particular conclusion.

18602 In *Etobicoke*, as in this case, it was accepted by all parties that compulsory retirement at less than age 65 *prima facie* constituted discrimination by virtue of age. The inquiry was then directed solely to the question of whether the discrimination was permitted as a *bona fide* occupational qualification.

18603 McIntyre, J. declared, at page 19, that the resolution of this question necessitated a determination, firstly, of what is a *bona fide* occupational qualification and requirement, and, secondly, whether it has been shown by the employer that the mandatory provision complained of would so qualify. With respect to the first matter, it was stated, at page 19:

> "To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

18604 There was no suggestion before the Board that the retirement provisions in the collective bargaining agreement between the City and the Union were agreed upon for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code.

18605 McIntyre, J. stated that the resolution of the second question was dependent upon a consideration of the evidence and the nature of the employment concerned. It was noted that, although everyone ages chronologically at the same rate, aging in the functional sense proceeds at widely varying rates and is largely unpredictable, and he therefore commented, at page 20:

> "Faced with the uncertainty of the aging process an employer has, it seems to me, two alternatives. He may establish a retirement age at 65 or over, in which case he would escape the charge of discrimination on the basis of age under the Code. On the other hand, he may, in certain types of employment, particularly in those affecting public safety such as that of airline pilots, train and bus drivers, police and firemen, consider that the risk of unpredictable individual human failure involved in continuing all employees to age 65 may be such that an arbitrary retirement age may be justified for application to all employees. In the case at bar it may be said that the employment falls into that category. While it is no doubt true that some below the age of 60 may become unfit for firefighting and many above that age may remain fit, recognition of this proposition affords no assistance in resolving the second question."

18606 The evidence before the board of inquiry in *Etobicoke* consisted principally of the testimony of firefighters, which, it was concluded, was largely 'impressionistic.' It was stated that something more than general assertions and expressions of the witnesses that firefighting is a 'young man's game' was required to enable the employer to discharge the burden of proof upon it. Although it was clearly noted that it would be unwise to attempt to lay down any fixed rule as to the nature and sufficiency of the evidence required, certain guidelines were nevertheless expressed at page 22:

> "In dealing with the question of a mandatory retirement age it would seem that evidence as to the duties to be performed and the relationship between the aging process and the safe, efficient performance of those duties would be imperative. Many factors would be involved and it would seem to be essential that the evidence should cover

> the detailed nature of the duties to be performed, the conditions existing in the work place, and the effect of such conditions upon employees, particularly upon those at or near the retirement age sought to be supported. The aging process is one which has involved the attention of the medical profession and it has been the subject of substantial and continuing research. Where a limitation upon continued employment must depend for its validity on proof of a danger to public safety by the continuation in employment of people over a certain age, it would appear to be necessary in order to discharge the burden of proof resting upon the employer to adduce evidence upon this subject."

18607 In light of the decision in *Etobicoke* as to the questions which must be resolved, and the guidelines as to the type of evidence required to resolve these questions, the Appellants have asserted that the Board erred in law in seven enumerated respects. However, some of the alleged errors, if they occurred, were incidental to the final conclusion of the Board. Because it is only necessary to determine if the Board made an error in law which affected its final conclusion, there is no need to examine each of the allegations of error.

IV

18608 In considering the nature of the burden on the employer of establishing, on a balance of probabilities, that a mandatory retirement age of less than 65 years was a reasonable occupational qualification or requirement, the Board stated, at page 29:

> "It is the Board's view that the case law establishes that it is still necessary for the employer to show that all members of the restricted class (in this case, those over 62 and eventually over 60) had the intolerable characteristic or that the incidence in that group was so great and not sufficiently identifiable as to make the risks from continuing to employ members of the group intolerable in the circumstances."

18609 Although the Board acknowledged that the foregoing wording had been extracted from a decision of a United States Court in *Usery v. Tamiami Trail Tours Inc.* 11 E.P.D. 10916, the Board further stated that the *Tamiami* test had been adopted in *Etobicoke* when reference was made to 'sufficient risk of employee failure.' The *Tamiami* case, however, was not referred to in *Etobicoke*, and the complete sentence containing the quoted phrase is set out on pages 20-21 of *Etobicoke*:

> "In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a *bona fide* occupational qualification and requirement has been shown the board of inquiry and the Court must consider *whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large.*" (emphasis added)

18610 The test adopted by the Board cannot be equated with the *Etobicoke* test. There is a significant difference between 'sufficient' risk and an 'intolerable' risk. Further, there is nothing in the *Etobicoke* decision justifying the assertion that the employer must show that 'all members' of the restricted class possess the 'intolerable' characteristic. It would be placing an impossible burden on an employer if this aspect of the test enunciated by the Board accurately reflects the law, particularly when even medical scientists cannot predict, for example, which individuals will suffer heart attacks.

18611 It is even less possible to extract from *Etobicoke* a test which is synonymous with the test, involving alternatives, enunciated by the Board. The alternative recited in the Board's test is only marginally less onerous than the first onus, in that it contemplates an employer establishing both that the incidence of failure is 'so great' in the particular group, and the failure within the group is not sufficiently identifiable, to make the risk 'intolerable.'

18612 The test which the Board enunciated as representing the burden placed on the employer to justify the mandatory retirement age at less than 65 years of age was therefore clearly erroneous in law. Nevertheless, it is still necessary to examine further the decision of the Board to determine if the Board actually applied the erroneous test, particularly because the Board stated, at page 50 of its reasons:

> "The Respondents have not convinced this Board that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large."

18613 Even although the last quoted sentence is very much closer to the test established in *Etobicoke*, the standard of proof on a balance of probabilities does not necessitate that the bearer of this burden 'convince' a tribunal, but only establish that the position it advocates is the more probable.

V

18614 The evidence quite clearly revealed that firefighting is arduous, physically demanding work and that firefighters, immediately prior to and while engaged in the activity of firefighting, are subject to intense stress and strain. The Board stated, at page 50 of its reasons, that the evidence in this respect was accepted.

18615 Statistical data filed by both the Respondents and the Appellants revealed that in the year 1976 in the United States 45% of on duty deaths among firefighters were due to cardiovascular accidents. In the year 1977 heart attacks accounted for 42.5% and strokes 1.5% of fatal injuries to firefighters. In 1979 the percentage of fatal injuries to firefighters attributable to heart attacks was only 38.9%, but in 1982 it was 52%.

18616 The Appellants adduced evidence to the effect that the cardiovascular function decreases with age; that the incidence of coronary atherosclerosis increases with age; that there is a marked increase in the risk after age 55 of acute myocardial infarction and coronary artery disease; that active firefighters die at a rate higher than in any other industry; and that firefighters over age 55, if required to exert themselves maximally, are likely to suffer significant coronary artery disease.

18617 In a four part report entitled "Heart Disease in Firefighters" by R. James Barnard, research cardiologist, filed by the Respondents, it was stated:

> "In conclusion, the available data show that firefighters do have an abnormally high incidence of heart disease. Studies conducted on firefighters and the firefighting environment suggest that stress associated with the job may be a major factor."

18618 The number of studies and published articles relating to coronary heart disease and firefighters reveals that a real problem is perceived to exist in this respect. The evidence of each of the expert witnesses presented by the Appellants and the Respondents acknowledged the existence of the problem, although there was a divergence in their opinions as to the suggested solution thereto.

18619 At page 51 of its reasons the Board stated:

> "The Board concludes that, even though there was no burden on it to do so, the Commission has established on a balance of probabilities that individual firefighters *at high risk of having a CHD event* can be detected and removed from the firefighting force without a blanket resort to age and at a cost which would not be prohibitive. Conventional risk factors can first be determined by way of a medical history, and, in many instances, where recognized risk factors are absent, further testing would not be required. Where indicated by the presence of one or more risk factors, a firefighter 60 years of age or older can take an exercise stress test (a tread mill test) to further define his risk of having a CHD event." (emphasis added)

18620 The only evidence as to the 'cost' referred to in the foregoing conclusion of the Board was that of Dr. Bruce, who estimated that the cost of the exercise tread mill test in the Seattle area was "somewhere around $130.00 to $150.00." With respect to the cost of tread mill equipment, Dr. Bruce stated that he was not sure — "It varies with the manufacturer and the model, but I think it's reasonable to say somewhere in the order of about $2,500.00 current market value." But there was no evidence whatever as to the likely cost of exercise stress tests in the City of Moose Jaw for firefighters employed by the City, nor was there any evidence that there are individuals in Moose Jaw equipped and trained to perform the tests.

18621 Notwithstanding the absence of evidence as to the 'cost' of testing, the foregoing conclusion clearly reveals that the Board must have accepted the 'sufficiency' of the risk of employee failure within the group against which there was discrimination, because of the reference in its previously quoted conclusion to "individual firefighters at high risk of having a CHD event."

18622 The evidence as a whole reveals that there is a risk — stated by one expert witness to be a 'significant' risk — of active firefighters dying of heart disease or heart attack. The existence of this risk was recognized by all of the expert witnesses. These witnesses expounded differing opinions, of course, as to the appropriate method of minimizing the risk, but the risk was sufficient to warrant the undertaking of all the various tests referred to in the evidence, the compiling of extensive statistical data, and the preparation of the innumerable articles citing the conclusions based thereon.

18623 In the final paragraph of its reasons the Board stated, in part:

> ". . . [A]nd is satisfied that *the risk of employee failure can be adequately reduced* by performance testing and screening for potential CHD events through medical histories followed by possible tread mill testing." (emphasis added)

18624 Thus, it is quite clear that the Board acknowledged the existence of 'sufficient risk of employee failure' — the first part of the test enumerated in *Etobicoke* — and the only question is whether the Board correctly applied the second part of the test in reaching its ultimate conclusion.

18625 The onus which was placed on the Appellants by virtue of the decision in *Etobicoke* was to adduce evidence justifying the conclusion that there is sufficient risk of employee failure over the mandatory retirement age to warrant early retirement in the interests of safety of the employee, his fellow employees and the public at large. The Board stated, however, at page 51, that the Respondents had not:

> "[M]et their burden of proving that it is impossible or highly impractical to deal with the retirement of firefighters between the ages of 60 and 65 on an individualized basis."

18626 This conclusion summarizes, to a large extent, the previously quoted conclusion of the Board, based on the *Tamiami* case, as to the burden facing the employer. This was not the onus which it was stated in *Etobicoke* must be satisfied by the employer. It is therefore quite clear that the Board did ultimately apply a test, in determining whether the discrimination on the part of the City was a reasonable occupational qualification and requirement for the position or employment of firefighters, which is erroneous in law. Because the entire consideration of the question to be resolved was based on an erroneous legal premise, the decision of the Board must therefore be reversed and the complaint of Roy Day dismissed.

There will be no costs to any of the parties.

CANADIAN
HUMAN RIGHTS
REPORTER

SASKATCHEWAN / EMPLOYMENT / AGE
Board of Inquiry
Len Craig v. The City of Saskatoon

Volume 5, Decision 374 Paragraphs 18627 - 18660 July/August, 1984

Board of Inquiry Decision under the
SASKATCHEWAN HUMAN RIGHTS CODE

Len Craig
Complainant

v.

The City of Saskatoon

and

The Saskatoon Professional Fire Fighters Union, Local 80
Respondents

Date: April 10, 1984

Place: Saskatoon, Saskatchewan

Before: E. Robert Stromberg

Appearances by: M.C. Woodard, Counsel for Len Craig and the Saskatchewan Human Rights Commission
T. Dust, Counsel for the City of Saskatoon
Donald Ching and Eric Cline, Counsel for The Saskatoon Professional Fire Fighters Union

Summary: *The Board of Inquiry finds that the City of Saskatoon and the Saskatoon Fire Fighters Union did not discriminate against Len Craig when they required him to retire from his position as Fire Marshall at the age of 60.*

The Board accepts evidence that Len Craig and his predecessor in the Fire Marshall position have never been called out to active fire fighting duty and that the Fire Prevention Branch is composed mainly of fire fighters who have been injured or have disabilities. However, the Board finds as a fact that Fire Marshalls are fire fighters and they are required to engage in active fire fighting duty because their job description states that they must be available as back-up if there are major fires.

The Board rejects the complainant's argument that there are methods of determining individual fire fighter's ability to perform the duties of their job by using functional tests and that consequently applying a mandatory retirement age of 60 is not necessary.

The Board finds that a mandatory retirement age set at 60 is a reasonable occupational qualification for the position Mr. Craig held.

The complaint is dismissed

REASONS FOR DECISION

18627 On the 22nd day of August, A.D. 1983 the Minister of Justice and Attorney General of Saskatchewan, J. Gary Lane, appointed myself as Chairperson and sole member of the Board of Inquiry to hear and decide the complaint of Len Craig against the City of Saskatoon and The Saskatoon Professional Fire Fighters Union, Local 80, of the International Association of Fire Fighters with regard to the allegation of discrimination against Len Craig by the Respondents because of age. The appointment was made pursuant to the provisions of The Saskatchewan Human Rights Code.

18628 On September 14, 1983 Notice of Formal Inquiry pursuant to Section 14(4) of The Saskatchewan Human Rights Code was given to all of the parties. An Answer was filed by the City of Saskatoon on September 27, 1983. An Answer was filed by the Fire Fighters Union on October 24, 1983. On September 9, 1983 a meeting was held and attended to by all Counsel representing the parties. The date set for the Inquiry was November 21, 1983. On September 13, 1983 the Inquiry was adjourned to December 5, 1983. On November 15, 1983 a further meeting was held with all Counsel present and the Inquiry was scheduled to begin February 13, 1984. At the opening of the Inquiry all parties agreed that adequate notice of time and place of the hearing had been properly given. The parties did not object to the jurisdiction of the Board. The Board of Inquiry sat from February 13 to February 16, 1984 inclusive at the Confederation Room in the Centennial Auditorium, Saskatoon, Saskatchewan. All parties presented argument to the Board of Inquiry on March 15, 1984. Each party submitted a written argument as well.

18629 The Complainant, Len Craig, a former employee of the City of Saskatoon Fire Department alleged that he was terminated from his position of Fire Marshall or Chief Fire Inspection Officer because of his age, in violation of Section 16(1) of *The Saskatchewan Human Rights Code* (the "Code"). He also alleged that his Union, the International Association of Fire Fighters Local 80, of the International Association of Fire Fighters (the "Union") discriminated against him in regard to his employment with the City of Saskatoon, (the "City") contrary to Section 18 of the Code, by agreeing to retirement provisions which required or allowed his employer to terminate his employment because of his age.

18630 The undisputed evidence is that Len Craig joined the Fire Department in May of 1947 at the age of 25 years, as a fire fighter. In September of 1967 he was promoted to the position of Fire Inspector. In September of 1977 he was appointed Chief Fire Inspection Officer, otherwise known as Fire Marshall. He occupied the position as Chief Fire Prevention Officer until the end of May, 1982 when he turned sixty years of age and at that time retired pursuant to the provisions of the Collective Bargaining Agreement (the "Agreement").

18631 Mr. Craig claimed he was in good health and able to perform his duties as Chief Fire Prevention Officer. However, in 1981 he was hospitalized with a leg problem. He stated he suffered from a gout problem and arthritis which

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he has had for several years. The extent of his disability, if any, resulting from his leg problems was not expanded upon.

18632 Section 12 of the Agreement between the City and the Union provides in part as follows:

> "ARTICLE 12. **SUPERANNUATION AND RETIREMENT**
>
> (a) With the exception of those employees covered by General Superannuation Bylaw #4323, who will retire on the first of the month succeeding their sixtieth (60th) birthday, all employees covered by this Agreement shall be retired at the first of next month following their sixtieth (60th) birthday, in accordance with Bylaw #5585."

18633 It is clear from the correspondence filed (Exhibits A-3 to A-8) and Mr. Craig's testimony, that Mr. Craig did not want to retire at age sixty but was required to do so because of his age. The report of the Personnel and Organizing Committee of the City dated May 31, 1982 recommended as follows:

> 1. "That City Council, as employer of Len Craig advise him that his services with the City will terminate as of May 31, 1982"; and
> 2. That, in light of the compensation retirement provisions of the Working Agreement and Pension Bylaw #5585 he will be eligible for pension benefits, in accordance with the Fire Fighters Pension Bylaw."

The recommendation of the Personnel and Organizing Committee was adopted by Saskatoon City Council May 31, 1982 and acted upon June 1, 1982 by the City Clerk (Exhibit A-8).

18634 The Code provides as follows:

> "16. (1) No employer shall refuse to continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term or condition of employment, because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.
>
> (7) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, physical disability or age do not apply where sex, physical disability or age is a reasonable occupational qualification and requirement for the position or employment.

Section 1(b) of the regulations made under the *Code* pursuant to Section 46 thereof is as follows:

> 1. (b) "reasonable occupational qualification" means, *inter alia* a qualification:
>
> that renders it necessary to hire members of one sex, one age group or of a certain physical ability exclusively in order that the essence of the business operation is not undermined; or
>
> that is essential or an overriding, legitimate business purpose; or
>
> that renders it necessary to hire members of one sex, one age group or of a certain physical ability exclusively in order that the duties of a job involved can be performed safely; but does not include, *inter alia*, a qualification;
>
> based on assumptions of the comparative employment characteristics of that sex, age group or state of physical disability in general;
>
> based on stereotyped characterisations of the sex, age or physical disability;
>
> based on the preferences of co-workers, the employer, clients or customers, except that, where it is necessary for the purpose of authenticity or genuineness, sex shall be a reasonable occupational qualification;

Section 18 of the *Code* provides:

> 18. No trade union shall exclude any person from full membership or expel, suspend or otherwise discriminate against any of its members, or discriminate against any person in regard to employment by any employer, because of the race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin of that person or member.

18635 By-law #5585 of the City, the "Fire Department Superannuation By-law" incorporates, by Section 2, the Superannuation Plan which applies to employees of the Fire Department, Section 5.1 of which provides for retirement at age sixty. Article 12(a) of the Collective Agreement between the Respondent City and the Respondent Union specifies that employees are to retire at the age of sixty. Len Craig was required to retire at that age.

18636 I have no difficulty in finding that the mandatory retirement provisions as exist in the Collective Bargaining Agreement between the City and the Union constitute a prima facie case of age discrimination. The question to be dealt with in this case is whether or not a reasonable occupational qualification and requirement exists and whether it has been shown by the evidence presented.

18637 Counsel for the Commission argued that Mr. Craig, as Chief Fire Prevention Officer, did not perform the same functions as a fire fighter and should not be subject to the same tests and physical qualifications as would ordinarily apply to a fire fighter employed and working as a fire fighter for the Saskatoon Fire Department.

18638 The Fire Marshall is in charge of the Fire Prevention Branch. He has seven Fire Inspectors and one Fire Investigator working under him. They work out of Fire Hall No. 1. Their duties, it was argued, are distinct from fire fighters. It was also argued by the Commission that the Fire Marshall and his Fire Inspectors are not responsible for the duties of the fire fighters and it is unreasonable in terms of a reasonable occupational qualification and requirement to subject a Fire Inspector or Marshall to age discrimination because of his duties of a fire fighter.

18639 Mr. Craig testified that since he transferred to the Fire Prevention Branch, he was never called out to fight a fire. His predecessor did not fight fires. Evidence was presented to the effect that the Fire Prevention Branch of the Saskatoon Fire Department is made up mainly of fire fighters who had been injured while working or had suffered some disabilities which prevented them from fighting fires. The transfer to the Fire Prevention Branch was made precisely because they could not fight fires.

18640 Exhibit A-10 is a handbook of general rules and regulations published by the Saskatoon Fire Department. The duties of the Chief Fire Prevention Officer are defined as follows:

> To be responsible to the Chief of the Fire Department for the supervision of Fire Inspectors and all related activities

> of the Fire Prevention Division. To enforce the Fire Prevention Act in all its phases, such as carrying out of regular fire hazard inspections, to recommend enforced compliance with the terms of the Act where necessary, to review daily inspection reports and follow up serious violations of the Act or occupancy codes as laid down by the National Board of Fire Underwriters. To administer educational programs in Fire Prevention by means of lectures, drills, films, etc., in schools, hospitals, factories, etc. To report on investigations of complaints regarding fire hazards. To refer to appropriate authority any apparent fire hazards or violations which are the concern of other civic departments such as the electrical, boiler, buildings, etc. To supervise the issuing of permits for oil-burning equipment and the inspection and approval of completed installations. To compile a variety of reports and maintain records as related to the operation of the Division. *To be available for call-back to major fires and assist in the determination of causes of the blaze.* Other related duties which may be assigned from time to time. (Emphasis added)

18641 Mr. Craig testified that fifty percent of his time as Fire Marshall was spent out of his office. He attended at fire sites after fires were put out to do investigative work. He also spent a good deal of his time doing inspections. Although Craig was not involved in fire fighting per se, the job description did require that he be available for call-back to major fires and assist in the determination of causes of the blaze. Chief Sebestyen indicated in his evidence that the Saskatoon Fire Department has not had an increase in manpower for six years. He stated that he was required to use as many men as he can in active fire fighting. He has no choice but to use all available personnel given budgetary constraints. He expected that all available personnel including persons in the Fire Prevention Branch should be available for fighting fires and indicated that since late 1983 he has been using the manpower from the Fire Prevention Branch to fight fires. Fire Prevention personnel also contribute information at fires with respect to the contents in buildings and the layout of the building that is on fire. The present Fire Marshall, Bruce Jones, also testified that he himself has fought fires on occasion and has been called back on other occasions. I find as a fact that members of the Fire Prevention Department including the Fire Marshall are fire fighters and are required to engage in active fire fighting when called back by the Fire Chief.

18642 The Fire Marshall while doing investigative work is involved in strenuous and dangerous work. The Fire Marshall in doing investigations must work in buildings that are in a weakened state or in a state of partial collapse. Involvement at the scene of a fire as an advisor or in a support capacity can also involve situations where it is reasonable to assume one should be physically fit and able to stand the rigors of fire fighting.

18643 The evidence presented to the hearing certainly left little doubt that fire fighting is a strenuous occupation. The turnout gear weighs approximately twenty-six pounds. The breathing apparatus weighs 35.5 pounds, the equipment that must be handled by the members of the Fire Department is heavy and cumbersome. While fighting fires, the fire fighters must be able to work in hot and dangerous conditions. While dressed in the turnout gear the risk of heat exhaustion is high when taking into account the extreme body heat buildup. The working environment is smoky, hot and dangerous. The fire fighter must be able to climb ladders, carry hose, rescue persons and be able to operate all types of fire fighting equipment. The risk of failure by a fire fighter would certainly put in danger the fire fighter, his fellow fire fighters and members of the public.

18644 The issue to be determined in this matter is whether or not a mandatory retirement at age sixty is a reasonable occupational qualification and requirement for the position of Fire Marshall in the Saskatoon Fire Department, and is therefore allowed pursuant to Section 16(7) of the Code.

18645 The Supreme Court of Canada, in *Ontario Human Rights Commission et al v. Borough of Etobicoke* 132 D.L.R. (3d) 14 (3 C.H.R.R., D/781) set out the guidelines to be followed in deciding the criteria for determining what a reasonable occupational qualification and requirement for the position would in fact be. In the *Etobicoke* case the Respondent Municipality, in pursuance of a Collective Bargaining Agreement with its Fire Fighters Association, required the individual Appellants, a Deputy Chief and a Captain, to retire at age sixty. Under the Ontario Human Rights Code, a refusal to employ or continue to employ any person because of age was prohibited, "age" being defined as between forty and sixty-five years. However, the Ontario Human Rights Code did permit discrimination if age is a *bona fide* occupational qualification and requirement for the position. In that case the individual Appellants filed a complaint of discrimination under the Code and it was upheld by a Board of Inquiry. An appeal, from that decision was allowed by the Ontario Divisional Court and a further appeal was dismissed by the Court of Appeal. On appeal to the Supreme Court of Canada it was held that the appeal should be allowed. The decision of the Court was delivered by Mr. Justice McIntyre (3 C.H.R.R., D/783).

18646 McIntyre J. characterized the test as follows:

> Two questions must be considered by the Court. Firstly, what is a *bona fide* occupational qualification and requirement within s. 4(6) of the Code and, secondly, was it shown by the employer that the mandatory retirement provisions complained of could so qualify? In my opinion, there is no significant difference in the approaches taken by Professors Dunlop and McKay in this matter and I do not find any serious objection to their characterization of the subjective element of the test to be applied in answering the first question. To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the *Code*. In addition it must be related *in an objective sense* to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.
>
> The answer to the second question will depend in this, as in all cases, upon a consideration of the evidence and of the nature of the employment concerned. As far as the

> subjective element of the matter is concerned, there was no evidence to indicate that the motives of the employer were other than honest and in good faith in the sense described. It will be the objective aspect of the test which will concern us. We all age chronologically at the same rate, but aging in what has been termed the functional sense proceeds at widely varying rates and is largely unpredictable. In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the *Code*. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause.
>
> Faced with the uncertainty of the aging process an employer has, it seems to me, two alternatives. He may establish a retirement age at 65 or over, in which case he would escape the charge of discrimination on the basis of age under the *Code*. On the other hand, he may, in certain types of employment, particularly in those affecting public safety such as that of airline pilots, train and bus drivers, police and firemen, consider that the risk of unpredictable individual human failure involved in continuing all employees to age 65 may be such that an arbitrary retirement age may be justified for application to all employees. In the case at bar it may be said that the employment falls into that category. While it is no doubt true that some below the age of 60 may become unfit for fire-fighting and many above that age may remain fit, recognition of this proposition affords no assistance in resolving the second question. In an occupation where, as in the case at bar, the employer seeeks to justify the retirement in the interest of public safety, to decide whether a *bona fide* occupational qualification and requirement has been shown the board of inquiry and the Court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large.

18647 McIntyre, J. held that in view of the evidence adduced before the Board of Inquiry the employer failed to discharge the burden of proof and he allowed the appeal and restored the judgment of the Board of Inquiry.

18648 The issue of "reasonable occupational qualification and requirement" was dealt with in *Manitoba Human Rights Commission and Finlayson v. Winnipeg et al* 1983 3 W.W.R. page 117 (3 C.H.R.R., D/902).

18649 In that case the Complainant was a former Police Officer. He lodged a complaint under the *Manitoba Human Rights Act* that his forced retirement as a Staff Inspector with the Winnipeg Police Department at age sixty constituted discrimination because of age, the Court of Appeal held that there was a prima facie violation of the Act but the City was entitled to rely on Section 6(6) which provided that the provisions of that Section did not apply where age was a reasonable occupational qualification and requirement for the position. It was reasonable to believe that at age sixty or over a police officer performing the Complainant's functions would have difficulty performing them safely and efficiently.

18650 In that case the Court of Appeal referred to the trial judgment at page 120 where Hamilton, J. stated as follows:

> "In the case at bar, the evidence before the learned adjudicator was overwhelming that age 60, if not an earlier age, was a reasonable, and in fact necessary, retirement age for an active police officer, such as superintendent Finlayson. The evidence was of a scientific and medical nature dealing with the question of aging and the mental and physical demands of the employment. There was evidence that the employee had to attend emergency situations from time to time and that a high standard of performance was required in the interest of the safety of the officer, fellow officers and members of the public in the vicinity. The conclusions of the learned adjudicator are amply supported by the evidence."

18651 In this case, the Human Rights Commission called two expert witnesses and the City of Saskatoon called one expert witness. Dr. Arthur S. Leon was qualified as an expert in cardiology, biochemistry and exercise physiology. Several exhibits were filed by the Commission which were authored by Dr. Leon. He stated that there was no consensus on the definition of the process of aging. He said that different experts have different theories on aging. He did not feel that a chronologic definition of aging was accurate. He felt that a biologic or functional definition of aging was more reasonable and more accurate. He further indicated aging was a process of changes which gradually occur with no sharp demarcation in any place in the life cycle of an individual and was evidenced by physiologic changes which occurred quite gradually unless there was a presence of chronic disease. He further stated that most people don't age at the same rate. He indicated that there were a number of constitutional factors that determine a person's aging rate which included genetic makeup, sex, body type, body composition, the number of illnesses one sustained in a lifetime, chronic disease, environmental factors, health habits, physical inactivity, and several other matters such as exercise, diet and use of leisure time. Dr. Leon was concerned about stereotyping employees at age sixty as being unfit to do firefighting work when there were ways of testing for this competency as a fire fighter. He claimed that with proper screening techniques and on the job testing, individuals who would be unable to do the job of a fire fighter could be retired.

18652 Dr. Paul Davis was also called to give evidence by the Human Rights Commission. He was a highly qualified expert in exercise testing and has conducted much research into the area of functional capacity. As well, he is an experienced fire fighter. He also indicated that individual testing could be used to predict a person's functional ability to perform the task of a fire fighter. He stated that age should not be the only criterion upon which a person's employment is based. He proposed that a series of tests have been developed by himself which adequately test a person's ability to be a fire fighter. He did state that on the average, a sixty year old person would not perform as well as a forty year old person and that one would not expect performances with advancing age to be better than individuals of lower age.

18653 Both of the Commission's experts did admit that age is an important factor in determining the performance of individuals. However, the two witnesses suggested that fire fighters be tested individually so as to obtain a more accurate determination of their ability to perform the duties inherent in their employment. They advocated that functional testing was more accurate in determining a fire fighters ability to perform his job rather than resorting to chronological age as a basis for making the determination. The approach to the problem advocated by the two witnesses may be reasonable. However, the issue to be determined in this matter is not whether a method of functional testing should be adopted but whether or not age is a reasonable occupational qualification and requirement for the position of fire fighter and/or Fire Marshall.

18654 Dr. Wiswell was called as a witness on behalf of the City of Saskatoon. Dr. Wiswell was qualified as an expert in exercise physiology and gerontology. He testified that aging occurs in everyone as a result of changes at the cellular level. He testified further that the process of aging is irreversible and accelerates after maturity. He stated that no matter what the level of fitness of a given individual, there will be a decline in function between the ages of thirty-five to sixty of between one-half percent and one percent per year. I do not believe these figures were disputed. He stated that there were several effects of aging which were detrimental to performance including hearing loss, muscle loss, gradual loss of function, decrease in exercise capacity, increase in risk associated with exercise, decrease in strength, decrease in ability to generate and maintain muscle tones, decrease in mobility and flexibility, poorer reflexes, decrease in ability to react to strength and several other factors. While aging rates vary among individuals, aging itself occurs in all individuals. He also concluded that as a person gets older their functional ability in areas obviously necessary to fire fighting decreases.

18655 The evidence of the three experts varied to a certain extent with respect to the emphasis one should put on individual testing to determine functional capacity. However, age was referred to by all experts. Age was the common denominator and was eventually resorted to by all experts when coming to a conclusion as to the capabilities and performance of individuals being tested. O'Sullivan, J.A. in *The Manitoba Human Rights Commission and Finlayson* (*supra*) dealt with the problem in part by stating at pages 126-127:

> Reviewing the evidence before us, I cannot think the adjudicator can have learned very much from it that he did not already know. I question the advantage of insisting that parties, at much expense and inconvenience, should call witnesses to testify to facts which must be within the realm of common knowledge and common sense. Boiled down, the evidence indicates that as a man gets older he gets weaker; a man whose job requires him to engage in physical activity is less able to do it well the older he gets, it is impossible scientifically to determine at what age a person is too old; not everybody ages at the same rate; a person's functional age is not always the same as the person's chronological age. The evidence also indicates that most police forces in North America have some kind of compulsory age requirement but no consistent pattern has emerged. In some forces the age for compulsory retirement is in the 50's; in some it is 60; in some it is 65.
>
> There were suggestions in the evidence that it may be possible to devise scientific tests to determine a person's functional age and that it would be desirable to require all employees to submit periodically to such tests with the possibility that those who have aged prematurely will lose their jobs even though they have not yet reached a conventional retirement age. If such tests become available, I am not sure it would be in the interests of working people generally to face the possibility of premature retirement because they fail their functional age test; I would think most workers think of the abolition of compulsory retirement as giving them an opportunity to work past the conventional retirement age rather than as imposing on them the danger of being forced out of the work force even before they reached that conventional age on the ground they have flunked a functional age test.

18656 The Board of Inquiry in *Roy Day v. the City of Moose Jaw and the Moose Jaw Fire Fighters Association, Local 553 of the International Association of Fire Fighters* (4 C.H.R.R., D/1805) found that the City of Moose Jaw and the Moose Jaw Fire Fighters Association discriminated against Roy Day by requiring him, through the provisions of the Collective Agreement in that case, to retire from his position as a Fire Fighter at the age of sixty-two. The Board accepted the expert testimony presented which indicated that chronological age is not the best test of functional ability and that other, more precise tests of functional ability and risk factors are available and can be used to provide individual assessments. The board held that age was not a reasonable occupational qualification and requirement for the position of a fire fighter and that the requirement that Roy Day retire before age sixty-five was a contravention of the *Code*. I disagree with that Board's conclusion. It is not necessary to carry out functional testing of individual fire fighters in order to determine whether or not age is a reasonable occupational qualification and requirement for the position of fire fighter.

18657 The average age of a member of the Saskatoon Fire Department is 42.32 years. Evidence was presented to indicate that if the retirement age for fire fighters was increased to 65 years, the average age of a fire fighter in the Saskatoon Fire Department would increase markedly. The Saskatoon Fire Department does not utilize individual physical or functional testing of its members. Prior to entry into the Saskatoon Fire Department a candidate must pass a physical examination. The candidate is, at that time, subjected to a form of functional testing. If admitted into the Fire Department, the candidate is not required to produce at any time thereafter evidence of medical fitness. Article 41 of the Collective Bargaining Agreement requires employees to provide the Fire Department of evidence of having undergone a complete physical examination by a qualified medical practitioner of their choice at the age of 50 and every three years thereafter until retirement. However, it does not require an employee to retire in the event the employee is not medically fit. Although firemen are encouraged to be physically fit, there is no standard medical and/or functional testing of individual firemen to insure their fitness. In fact, the evidence presented to the Board established the fact that with the exception of a few of the younger members of the Fire Department regular exercising did not take place.

18658 Analyzing the evidence presented leaves me with no doubt that as one ages one's ability to perform the tasks of a fire fighter decreases. The evidence of Chief Sebestyen, Lieutenant Hollier, Fire Marshall Jones, Lieutenant McIntyre and fire fighter Rumpel outlined the duties to be performed by various ranks in the fire department. The conditions in which those duties are performed can on many occasions test the limits of an individual regardless of his position. All members are expected to be able to participate in providing fire protection to the City. The safe and efficient performance of a fire fighter's duties is imperative especially where a situation exists involving danger to the life of a member of the community or to a fellow fire fighter. It is my opinion that there is no reliable testing procedure that will accurately determine how an individual will react or be able to cope in an emergency situation. The evidence of the experts to the effect that some persons who are 60 years of age can out perform some 30 year olds is not comforting in that the converse of the argument is also true.

18659 The evidence presented to the Board of Inquiry clearly established that as a person gets older their ability to function in a physical activity is reduced. The evidence presented to this Inquiry clearly satisfies me that a mandatory retirement age set at the age of 60 years is a reasonable occupational qualification and requirement to be prescribed by the City. After taking into account the evidence of the experts called by the City and the Commission, I have no hesitation in stating that my conclusion is based on statistical and medical evidence based on observation and research of the experts on the question of aging. Moreover, the evidence of the members of the Fire Department cannot be overlooked. The evidence indicated that since 1947 the age for retirement for members of the Saskatoon Fire Department has been set at age 60. The retirement age was instituted in good faith for the purpose of improving fire protection to the people of Saskatoon. The Union and the City have through free collective bargaining, negotiated in good faith and have incorporated the mandatory retirement into the Collective Bargaining Agreement. The members of the Union and its Collective Bargaining team who must perform the tasks of fire fighters are best able to determine what is reasonable in the circumstances. The Union and the City have agreed on a retirement age of 60 years in the best interests of the fire fighter and the citizens of Saskatoon who ultimately must rely on a capable and able fire department for protection of life and property.

18660 I find that the mandatory retirement provision of the Collective Bargaining Agreement is not discriminatory in that age 60 is a reasonable occupational qualification and requirement for the position of a fire fighter. The provisions of Section 16(1) of The Saskatchewan Human Rights Code do not apply to the City of Saskatoon and/or the Union in this matter. I find that the complaint of Mr. Craig is not substantiated and therefore I dismiss the complaint.

CANADIAN HUMAN RIGHTS REPORTER

Volume 5, Decision 381 **Paragraphs 18887 - 18925** **September, 1984**

SASKATCHEWAN / EMPLOYMENT / DISABILITY

Board of Inquiry

Cheryl Sandiford v. Base Communications Ltd.

Board of Inquiry Decision under the
SASKATCHEWAN HUMAN RIGHTS CODE

Cheryl Sandiford
Complainant

v.

Base Communications Ltd.
and
Mac Jenkins
Respondents

Date: May 3, 1984
Place: Saskatoon, Saskatchewan
Before: Randy K. Katzman
Appearances by: Milton Woodard, Counsel for the Saskatchewan Human Rights Commission and Cheryl Sandiford
Lloyd Jenkins, appearing for Base Communications Ltd. and Mac Jenkins

Summary: *The Board of Inquiry finds that Base Communications Ltd. contravened the Saskatchewan Human Rights Code when it terminated the employment of Cheryl Sandiford because she had an epileptic seizure at work. Sandiford was employed by Base Communications as a telephone operator. Base Communications Ltd. provides a telephone answering service and its employees answer telephones, take messages, relay messages, page clients and monitor alarms on a twenty-four hour a day basis.*

The employer terminated Ms. Sandiford's employment on the grounds that the stress and pressure were too much for her. However, Ms. Sandiford returned to the employer with a doctor's letter indicating that she could perform the work, but that she could not work alone.

Though Base Communications Ltd. indicated to all starting employees that they would be required to work all shifts, and working the night shift did require working alone, the Board of Inquiry accepted evidence presented at the hearing that a number of employees at Base Communications had never worked the night shift, and that working the night shift alone was not a requirement made of all employees.

The Board of Inquiry finds that Ms. Sandiford could perform the job duties, that her epilepsy could be accommodated, and that an absence of epilepsy does not constitute a reasonable occupational qualification for the position of telephone operator with Base Communications Ltd.

The Board of Inquiry orders Base Communications Ltd. to compensate Cheryl Sandiford 1360 dollars for lost wages and to pay 1500 dollars in compensation for humiliation and damage to self-respect.

18887 On January 26, 1984 the Board of Inquiry having given all parties to the matter notice of its intention to do so, commenced a formal inquiry into the complaint of Cheryl Sandiford against Base Communications Ltd. and Mac Jenkins. The complaint alleged that a violation of *The Saskatchewan Human Rights Code* took place on or about June 14, 1982 when the complainant was discriminated against by the Respondents because of physical disability.

18888 The complaint alleged that the particulars of the violation were as follows:

> "(1) I was hired as a part time switchboard operator at Base Communications Ltd. on June 8, 1982. This part time position was to lead to a full time position in August, 1982.
>
> (2) On June 14, 1982 I suffered an epileptic seizure while at work. As a result of this incident my employer, the above named respondents terminated my employment. I believe that my epileptic condition would have required little or no accommodation, which could have easily been arranged.
>
> (3) I believe that my employment with Base Communications was terminated because of my physical disability of epilepsy in violation of Section 16(1) of *The Saskatchewan Human Rights Code*."

Facts

18889 In response to an advertisement contained in a newspaper, Cheryl Sandiford applied to Base Communications Ltd. (hereinafter referred to as "Base") for the position of a part time switchboard operator which she was advised at the time of her application would lead to a full time position after a three month probationary period. The rate of pay was four dollars and twenty-five cents per hour with respect to this position.

18890 Sandiford began working for Base June 8, 1982 and actually worked five days until June 14, 1982. As of June 14, 1982 she had worked thirty-four hours in five days of actual employment.

18891 Base provides a telephone answering service to its clients. The employees of Base answer telephones, take messages, relay and dispatch messages, page clients and monitor alarms on an around the clock basis. The evidence before the Board of Inquiry was that Base, at the material time, had three regularly scheduled eight hour shifts. The day shift, from 7:00 a.m. to 3:00 p.m., the afternoon shift from 3:00 p.m. to 11:00 p.m., and the evening shift from 11:00 p.m. to 7:00 a.m. The day shift was the most active shift and accordingly has more employees scheduled to work in comparison to the other shifts. The evening shift was the least active shift and ordinarily had only one employee scheduled to work.

18892 It was the policy of Base to inform the employees once they had commenced employment that it would be expected of each employee that they would have to work all of the shifts. The evidence before the Board of Inquiry was

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that some of the employees had never been scheduled to work the evening shift. Further, that the management of Base attempted to be flexible in the scheduling of employee shifts to accommodate the wishes of their employees. Employees were allowed to trade shifts with other employees and have friends or relatives accompany the employee if working alone on the evening shift.

18893 On June 14, 1982 Sandiford started work at 7:00 a.m. and at approximately 1:00 p.m. she had an epileptic seizure. At that time employees Zubrecki, McVicar and Sandiford were working at the switchboard and the supervisor Moskal was at the alarm machine. Zubrecki went to the office seeking assistance, leaving McVicar alone at the switchboard.

18894 Moskal and the General Manager of Base, Mac Jenkins tended to Sandiford and when Sandiford was fully conscious she was told to see Mac Jenkins in his office. It is alleged by the Respondents that while talking to Mac Jenkins, Sandiford indicated she was not capable of coping with the stress and demands that the position of switchboard operator placed upon her and that in fact she wished to resign from her position.

18895 The Board notes that upon cross-examination of Lloyd Jenkins he clearly indicated that subsequent to June 14, 1982 all of the employees of Base were questioned by Base as to whether or not they would object to Sandiford not being required to work the evening shift and that the responses obtained from the employees varied.

18896 Subsequent to the seizure, Sandiford in an attempt to regain her employment, returned to Base with a letter from Dr. Robert D. Forrest which indicated Sandiford was capable of functioning in the position of a switchboard operator but that she should not work by herself.

18897 On August 9, 1982 Sandiford commenced employment at All-Sask. Answering Service (hereinafter referred to as All-Sask) where she is presently employed as a switchboard operator. The work performed by switchboard operators at All-Sask and Base is very similar as is the equipment the switchboard operators are required to use.

18898 Sandiford's performance as a switchboard operator at All-Sask was described by her supervisor as being reliable and competent and Sandiford was rated as being an above average employee. Indeed, Sandiford's current supervisor preferred Sandiford to be scheduled to work the busy shifts because of her demonstrated competency.

18899 Sandiford has had an epileptic seizure while working for All-Sask which did not present serious difficulties to her employer. The manager of All-Sask described the problems encountered with Sandiford having a seizure as presenting no more hardship than other switchboard operators having the flu or being required to leave to attend to their sick children.

The Issues

18900 The issues before the Board of Inquiry are:

(1) whether Sandiford resigned from her position with Base on June 14, 1982;

(2) whether Base violated Section 16(1) of *The Saskatchewan Human Rights Code* by refusing to continue to employ Sandiford because of a physical disability;

(3) whether, if Base violated 16(1) of *The Saskatchewan Human Rights Code*, the Respondents have justified their actions within the terms of Section 16(7) of *The Saskatchewan Human Rights Code*.

18901 This Board rejects the allegations put forward by the Respondents that Sandiford resigned from and/or wished to terminate her own employment with Base because she could not cope with the stress and pressure inherent therein. The Board finds that Sandiford was informed by the General Manager, Mac Jenkins, immediately after the seizure that she would no longer be employed by Base as it would be better for her health not to be working in such a high stress position.

18902 It was the evidence of Lloyd Jenkins that, subsequent to June 14, 1982, efforts were made by management to contact the other switchboard operators to see if they would object to Sandiford not being required to work the evening shift. If Sandiford resigned because of the stress and pressure then there was no reason whatsoever for management to so contact the other employees.

18903 Further, the evidence clearly showed that Sandiford attempted to get her position reinstated as she returned with the letter of Dr. Forrest for the purpose of being reinstated. This is not consistent with the allegation that Sandiford resigned of her own accord because she could not cope with the stress and pressure of the position of switchboard operator.

The Question of Prima Facie Violation of Section 16(1) of The Saskatchewan Human Rights Code

> "*No employer shall refuse to* employ or *continue to employ* or otherwise discriminate against any person or class of persons with respect to employment or any term of condition of employment, *because of his* or their race, creed, religion, color, sex, marital status, *physical disability*, age, nationality, ancestry or place of origin" (emphasis mine).

18904 The general manager of Base, Mac Jenkins, gave instructions to Roxanne Antosh to prepare Sandiford's termination papers and pay cheque after Sandiford left his office on June 14, 1982. There can be no doubt that Sandiford's employment was terminated immediately after her epileptic seizure.

18905 Section 2(a) of *The Saskatchewan Human Rights Code* defines "physical disability" as follows:

> "*physical disability means any degree of physical disability*, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness *and, without limiting the generality of the foregoing, includes epilepsy*, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device;"
> (emphasis mine)

18906 There can only be one explanation for Sandiford's termination and that is that in her employer's opinion a person who has epilepsy can not perform the function of a switchboard operator. There was no evidence brought before the Board of Inquiry that anything was lacking or deficient in the performance of her work prior to the epileptic seizure. The Board of Inquiry finds that Sandiford's employment was terminated because she had epilepsy, and accordingly 16(1) of *The Saskatchewan Human Rights Code* had been violated.

The Reasonable Occupational Qualification Issue

18907 The main issue that should have been before this Board of Inquiry was whether the Respondents could rely on Section 16(7) of *The Saskatchewan Human Rights Code* which states:

> "The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, physical disability or age do not apply where sex, physical ability or age is a reasonable occupational qualification and requirement for the position or employment."

18908 Section 1(b) of the regulations to *The Saskatchewan Human Rights Code* define occupational qualification as follows:

> "reasonable occupational qualification" means, inter alia, a qualification:
>
> (i) that renders it necessary to hire members of one sex, one age group or of a certain physical ability exclusively in order that the essence of the business operation is not undermined; or
>
> (ii) that is essential or an overriding, legitimate business purpose; or
>
> (iii) that renders it necessary to hire members of one sex, one age group or of a certain physical ability exclusively in order that the duties of a job involved can be performed safely; but does not include, inter alia, a qualification
>
> (iv) based on assumptions of the comparative employment characteristics of that sex, age group or state of physical disability in general;
>
> (v) based on stereotyped characterizations of the sex, age group or physical disability;
>
> (vi) based on the preferences of co-workers, the employer, clients or customers, except that, where it is necessary for the purpose of authenticity or genuineness, sex shall be a reasonable occupational qualification;
>
> (vii) that distinguishes between "light" and "heavy" jobs which operate in a disguised form of classification by sex and which creates unreasonable obstacles to the advancement by females into jobs which females could reasonably be expected to perform."

18909 The Board concludes that once a prima facie violation of *The Saskatchewan Human Rights Code* is established, the burden shifts to the Respondents to show by clear objective evidence that the absence of epilepsy is a reasonable occupational qualification as it is necessary to the essence of the business operation, or to the essential purpose of the organization or for reasons of employment safety.

18910 The Board of Inquiry has addressed itself to the question as to what constitutes a reasonable occupational qualification and in doing so has relied on the unreported case of *The Manitoba Human Rights Commission and John W. Finlayson v. The City of Winnipeg et al,*[1] a decision of the Manitoba Court of Queen's Bench.

18911 This decision is particularly useful as the wording of *The Manitoba Human Rights Act*, Chapter H 175 R.S.S.M. 1970 and *The Saskatchewan Human Rights Code* use the wording "reasonable occupational qualification" as opposed to the wording "bona fide occupational qualification" which most other Canadian jurisdictions make use of.

18912 In this decision, which considered a mandatory retirement age for policemen, the Honourable Mr. Justice Hamilton reviewed the decision of the Supreme Court of Canada in *The Ontario Human Rights Commission et al v. The Borough of Etobicoke* (1982) 40 N.R. 159 and then stated:

> "Upon further considering the *Etobicoke* case and the Manitoba legislation, however, I am of the opinion that an age that has been previously set for other reasons may nevertheless be justified and upheld. The Manitoba Act says that the provisions against discrimination do not apply where . . . age . . . is a reasonable occupational qualification and requirement. It does not speak of whether the employer has established the age with those matters in mind or not. It would appear that as long as the employer can satisfy a Board of Adjudication or the Court that 60 is a reasonable or reasonably necessary, retirement (age) for this type of employee, his discharge at that age may be upheld."

18913 This Board of Inquiry adopts the reasoning of Hamilton, J. and concludes that there is no subjective element to the test where the term "reasonable" is used, and that the proper test is an objective one.

18914 This Board of Inquiry further concludes that the relevant test given the terms of the Saskatchewan legislation is that once a prima facie case of discrimination is established, the employer, to establish a reasonable occupational qualification must show in an objective sense that the requirement is necessary to the performance of the employment concerned to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

18915 This is the same test as put forward by Chairperson Bekolay in *Roy Day v. The Moose Jaw Fire Fighters Association Local 553 of the International Association of Firefighters and the City of Moose Jaw.*[2]

18916 The onus is entirely on the Respondents to adduce this relevant evidence if they intend to rely on Section 16(7) of *The Saskatchewan Human Rights Code*. This Board of Inquiry was presented with very little evidence by the Respondents.

18917 The Board of Inquiry was presented with very compelling evidence, however, to demonstrate that not only could the Applicant perform all the functions of a switchboard operator but that any disruption in the work environment due to an epileptic seizure could be handled in the same manner as a switchboard operator becoming suddenly ill or a switchboard operator leaving the work place to attend their sick children at school.

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[1] Editor's note: now reported (1982) 3 C.H.R.R., D/902.

[2] (1983) 4 C.H.R.R., D/1805.

18918 Further the only medical evidence put before the Board of Inquiry clearly indicated that Sandiford was capable of performing all the functions of a switchboard operator.

18919 On the evidence presented to this Board of Inquiry, the Board of Inquiry has no alternative but to conclude that the Respondents have not met their burden of proving on a balance of probabilities that Section 16(7) of *The Saskatchewan Human Rights Code* should apply and therefore the violation of *The Saskatchewan Human Rights Code* by the Respondents has not been justified.

Damages

18920 The Board accepts the evidence of Cheryl Sandiford and the documents filed with the Board in support thereof that she has by reason of the actions of the Respondents, lost wages for the period June 15, 1982 to and including August 9, 1982.

18921 The Board accepts the evidence of Cheryl Sandiford that she felt humiliated, hurt, angry and upset by the actions of the Respondents.

ORDER

18922 THIS MATTER coming on for hearing the 26th day of January, A.D. 1984, before a Board of Inquiry, efforts at settlement having failed, and the Minister having directed a formal inquiry pursuant to Section 29 of The Saskatchewan Human Rights Code, in the presence of counsel for the Commission, who also acted as counsel for the Complainant, and in the presence of Lloyd Jenkins appearing on behalf of the Respondents;

18923 UPON HEARING the evidence adduced by the parties and what was alleged by all parties, on the 26th and 27th days of January, A.D. 1984, and upon the findings of the Board of Inquiry that the complaint of Cheryl Sandiford against Base Communications Ltd. and Mac Jenkins was well founded and that she was discriminated against on the basis of her physical disability in relation to her employment as alleged;

18924 IT IS HEREBY ORDERED AND DECLARED that the Respondents, Base Communications Ltd. and Mac Jenkins pay to the Complainant, Cheryl Sandiford, as compensation in respect of hurt feelings, the sum of $1,500.00 by forwarding the said sum of $1,500.00 on or before the 3rd day of July, A.D. 1984 to the offices of The Saskatchewan Human Rights Commission at 8th Floor, Canterbury Towers, 224-4th Avenue South, Saskatoon, Saskatchewan, S7K 5M5;

18925 AND IT IS FURTHER ORDERED that the Respondents pay damages for lost wages to the Complainant, Cheryl Sandiford, in the amount of $1,360.00 on or before the 3rd day of July, A.D. 1984.

Randy K. Katzman
Chairperson, Board of Inquiry

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / HOUSING / RACE
Board of Inquiry
Charles Wagamese v. Ruth Genest

Volume 5, Decision 382 Paragraphs 18926 - 18945 September, 1984

Board of Inquiry Decision under the
SASKATCHEWAN HUMAN RIGHTS CODE

Charles Wagamese
Complainant

v.

Ruth Genest
Respondent

Date:	May 22, 1984
Place:	Saskatoon, Saskatchewan
Before:	Robert G. Finley
Appearances by:	Genevieve Leslie, Counsel for the Saskatchewan Human Rights Commission and Charles Wagamese

Summary: ***The Board of Inquiry finds that Ruth Genest discriminated against Charles Wagamese because of his race and ancestry when she refused to rent to him an available apartment because he is of native ancestry.***

The Board orders Ruth Genest to pay 400 dollars to Charles Wagamese in compensation for humiliation and damage to self-respect. In addition, the Board requires Ruth Genest to inform the Saskatchewan Human Rights Commission of any vacancies that occur at the same address in the next six months and of the reasons for any refusal, should any person of native ancestry be refused accommodation during this period.

18926 This hearing arises as a result of an amended complaint under Part II of The Human Rights Code of Saskatchewan that the Respondent Ruth Genest discriminated against the Complainant Charles Wagamese because of race and ancestry and that as a result of the discrimination Ruth Genest

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denied Charles Wagamese occupancy of housing accommodation in violation of Section 11(1) of *The Saskatchewan Human Rights Code*.

18927 One Sandra Roland gave evidence that she had resided in a suite at 311 Avenue D North, Saskatoon, Saskatchewan, and had made a decision to vacate the suite. Roland was a friend of the Complainant, Charles Wagamese, and was aware that Wagamese was in need of a suite. Her evidence is that she communicated to Genest that she had a friend who was in need of rental accommodation. According to Roland, Genest asked her if the friend was male. Upon receipt of an affirmative answer, according to Roland, Genest then asked if the friend was white. Roland testified that upon being advised that Wagamese was of native ancestry Genest made a statement that "if you get one you get the whole tribe." Roland testified that she came to the defence of Wagamese and at that time Genest agreed to speak to Wagamese.

18928 Roland testified that she communicated to Wagamese the content of her conversation with Genest.

18929 In his evidence Wagamese testified that on November 29, 1982, he telephoned Ruth Genest and as a result of the telephone call attended to 311 Avenue D North, Saskatoon, Saskatchewan, to view the rental accommodation. Wagamese stated that after conversing with Ruth Genest and after viewing the accommodation, he made a decision that he wanted to rent it as it was acceptable to him and was convenient to his working place. Wagamese testified that he made the offer to Ruth Genest to rent the suite and to pay a damage deposit on the spot but further testified that Genest told him that she was only taking applications and would let him know on December 2, 1982 whether his application had been accepted. According to Wagamese, Ruth Genest did not ask for any information or references but that she did write his name in a book. Wagamese testified that when he left the premises he felt that he was not being given fair consideration as an applicant for the property. He testified that he was not successful in finding suitable alternative accommodation and that as a result of this experience and information he received after his wife Lori attended to 311 Avenue D North the same day, he felt humiliation, anger, frustration and hurt.

18930 Wagamese further testified that the reason he was seeking accommodation was that he and his wife Lori were at the time experiencing matrimonial difficulties and had made the decision that he should live in separate accommodation. He testified that after his encounter with Ruth Genest he immediately returned to his wife's place of residence and told her of his experience at 311 Avenue D North.

18931 Lori Wagamese who is white testified that, upon hearing from her husband his experience of the encounter with Ruth Genest and his attempt to rent the accommodation at 311 Avenue D North, she immediately went to that address and was shown the same accommodation that shortly before had been viewed by her husband. Her testimony is that she asked Mrs. Genest whether the accommodation was available immediately and in reply Mrs. Genest is said to have indicated that Lori Wagamese could have the accommodation immediately. Lori Wagamese's evidence is that she attended to the address at 311 Avenue D North within 10 minutes of the time that her husband had returned from that address. Both had attended between 7:00 and 8:00 p.m. on November 29, 1982.

18932 Cindy Thomas, an investigator for The Human Rights Commission, testified that she interviewed Mrs. Genest on December 10, 1982 at The Human Rights office in Saskatoon. According to Thomas, Genest did acknowledge that Wagamese had been ready to pay money down at the time that he attended at 311 Avenue D North on November 29, 1982, but that she had refused to accept his money for the following reasons.

1. She was running an advertisement in the Saskatoon Star Phoenix and the advertisement was to continue running until December 2, 1982;
2. The bed required repair before the premises were ready for occupancy; and
3. She was only taking applications at the time that Wagamese attended and inspected the property.

18933 According to Thomas, Genest admitted that the suite was rented to someone by the name of Unger on November 30, 1982 and possession was given on December 1, 1982. According to Thomas, Genest had not told Wagamese about the bed requiring repair. Genest also testified that it was her normal practice whenever possible to try to rent a suite by the last day of the month, but on this occasion had told Wagamese that she would not make her decision until December 2, 1982 because the advertisement for the suite ran until that date.

18934 Thomas alleged that Genest also stated that Unger got the suite because (unlike Wagamese) Unger had not asked for a quiet suite. Also Unger had worked for 14 years compared to Wagamese's two year record of employment.

18935 One Richard Tottengurger testified that in the late fall of 1982 he attended to 311 Avenue D North with a view to obtaining rental accommodation. Tottengurger had a water bed which was not acceptable to Genest. However, Tottengurger obtained the impression that the accommodation would have been his if he had wanted it even though he would have been four or five days late in paying his rent. Mr. Tottengurger could not recall with absolute certainty the date that these events took place but indicated that he thought it was near the end of the month before Christmas.

18936 Mrs. Genest testified on her own behalf and indicated that two suites were available for rent during the month of November, 1982 at 311 Avenue D North. She acknowledged that Mr. Wagamese had come to the premises on November 29, 1982, that he had been shown both suites, but indicated he was prepared to rent one of the suites and had in fact proceeded to put money on the table, at which time Mrs. Genest told Mr. Wagamese that at the time she was only taking applications and would notify him on December 2, 1982 if his application had been accepted. Mrs. Genest also agreed that Lori Wagamese (who identified herself to Mrs. Genest as Lori Nottingham) came to the property after Mr. Wagamese left. Mrs. Genest denied she indicated to Mrs. Wagamese that she could have the suite immediately because (Mrs. Genest testified) the suite was not immediately available. According to Mrs. Genest, Mrs. Wagamese said she would have to bring her son over to see whether he would approve of the accommodation before renting it and that she (Mrs. Wagamese) would be back the next day and would take her chance that the suite would not be rented in the meantime.

18937 Mrs. Genest admitted that she had made the statement "If you get one you get the whole tribe" to Sandra Roland but indicated that that was a figure of speech that she had used that doesn't relate to persons of native ancestry alone. Mrs. Genest stated that she had rented not only to natives, but to persons of various ancestries and repeated her allegation that, at the time Mr. Wagamese had attended to 311 Avenue D North, she was only taking applications. Mrs. Genest did acknowledge that the newspaper advertisement for the suite indicated the suite would be available on December 1, 1982. She further acknowledged that she did in fact rent the suite to a Mr. Unger on November 30, 1982. Although she was not certain, she believed that the bed had been repaired on that date.

18938 The question to be answered is whether Ruth Genest did discriminate against Charles Wagamese because of race and ancestry and as a result of the discrimination did deny Charles Wagamese occupancy of housing accommodation in violation of Section 11(1) of *The Saskatchewan Human Rights Code*.

18939 I accept the evidence of Sandra Roland which was verified by Ruth Genest that Ruth Genest prior to interviewing Charles Wagamese made the statement "If you get one you get the whole tribe." I believe that Ruth Genest prior to Charles Wagamese's attendance at 311 Avenue D North on November 29, 1982 had made a determination that she would not rent the suite to a person of native ancestry.

18940 It is not necessary that I accept the evidence of Lori Wagamese (which I do) that she was advised the accommodation would be available to her immediately when she attended to 311 Avenue D North shortly after her husband's attendance on November 29, 1982.

18941 In her statement to Cindy Thomas, Ruth Genest gave three reasons that she had not rented the accommodation to Charles Wagamese when he attended to the premises on November 29, 1982. Firstly, she stated that the advertisement for the suite would run until December 2, 1982. Secondly, she stated that the bed required repair. Thirdly, she stated that at the time that Charles Wagamese attended she was only taking applications.

18942 In spite of these reasons she rented the suite on November 30, 1982, to a Mr. Unger. The newspaper advertisement indicated that the suite would be available on December 1, 1982. The refusal to accept Charles Wagamese as a tenant when he applied for the accommodation on November 29, 1982 is not consistent with Ruth Genest's practice of attempting to rent the accommodation prior to the end of the month.

18943 Based upon all the evidence presented at this hearing, I find that Ruth Genest discriminated against Charles Wagamese in respect to housing accommodation because of race and ancestry contrary to Section 11(1) of *The Saskatchewan Human Rights Code*.

18944 Having found that Ruth Genest discriminated against Charles Wagamese, I hereby order:

1. That Ruth Genest pay compensation to Charles Wagamese, in respect of humiliation and hurt feelings, the sum of $400.00 by forwarding the sum of $400.00 to the office of The Saskatchewan Human Rights Commission, 8th Floor Canterbury Towers, 224 - 4th Avenue South, Saskatoon, Saskatchewan, S7K 5M5, on or before the 30th day of June, 1984.

2. That Ruth Genest send written assurance to the office of The Saskatchewan Human Rights Commission at the said address within 30 days of this Order that she will abide by The Saskatchewan Human Rights Code and that all persons seeking rental accommodation in any property she owns or controls will be treated without regard to race, colour or ancestry.

3. That Ruth Genest for a period of six months from the date of this Order inform The Saskatchewan Human Rights Commission at the above address of any vacancies in any rental property owned by her and in the event that any person of native ancestry is refused accommodation to provide The Saskatchewan Human Rights Commission with written reasons for such refusal within 10 days of the date of the refusal.

18945 One other minor matter remains to be considered. Counsel for The Saskatchewan Human Rights Commission requested that I obtain a transcript of the evidence. I have not found it necessary to obtain a transcript for the purpose of making my determination. I have therefore declined to order such a transcript. If the Commission requires a transcript it is of course free to order the same directly from the Reporter at its own cost.

Robert G. Finley,
Chairperson and sole member
of the Board of Inquiry

CANADIAN
HUMAN RIGHTS
REPORTER

SASKATCHEWAN / EXEMPTION
Saskatchewan Human Rights Commission
Saskatchewan Police Commission

Volume 5, Decision 395 Paragraphs 19527 - 19581 October, 1984

Saskatchewan Human Rights Commission Decision
under the
SASKATCHEWAN HUMAN RIGHTS CODE

The Saskatchewan Police Commission
Applicant

Saskatchewan Voice of the Handicapped
The Saskatchewan Federation of Labour
The Saskatchewan Police Federation
Disabled Persons Employment Service
Weyburn City Policemen's Association
Intervenors

Date: May 18, 1984

Place: Saskatoon, Saskatchewan

Before: Ronald J. Kruzeniski, Theresa Holitski, Jan Kernaghan, Kayla Hock, Helen Hnatyshyn

Summary: *The Saskatchewan Human Rights Commission refuses to grant the Saskatchewan Police Commission an exemption in order that age may be asked on application forms for police officers.*

The Police Commission argues that date of birth is required in order that checks on criminal record can be done through the Canadian Police Information Centre (CPIC). The Human Rights Commission accepts that date of birth is required for CPIC checks, but finds that employers of police can ask questions with respect to criminal record and can make employment offers conditional on a satisfactory confirmation that the employee has no criminal record which is a bar to employment.

The Human Rights Commission refuses to grant the exemption on the grounds that employers of police can still obtain information necessary to proper assessment of potential employees without having date of birth on police application forms. In addition, the Human Rights Commission finds that age has been used in the past by employers of police to discriminate contrary to the Saskatchewan Human Rights Code and consequently the Police Commission's request for this exemption does not occur in a neutral employment environment

The Human Rights Commission similarly refuses to grant an exemption to the Police Commission to allow them to conduct medical examinations of applicants for police officer positions before they have made an offer of employment in writing. The Human Rights Commisson finds that employers of police can comply with the Commission's existing ruling on medical examinations without undue inconvenience or difficulty.

The exemption requests are refused.

19527 The Saskatchewan Police Commission by a letter dated September 23, 1983 to Mr. Ken Norman, former Chief Commissioner of the Saskatchewan Human Rights Commission, applied for an exemption from *The Saskatchewan Human Rights Code* for the following:

1. To be allowed to ask the age of an applicant when an applicant applies for a position with a municipal police force within the province of Saskatchewan.
2. To require a medical examination of an applicant for a position on a municipal police force prior to any interview taking place or any job offer being made.

19528 This application is made by the Saskatchewan Police Commission pursuant to Section 48 of *The Saskatchewan Human Rights Code* which provides as follows:

> 48. (1) Where any person or class of persons is entitled to an exemption under any provision of this Act or any other Act administered by the commission or where the commission or the Director of Human Rights considers it necessary and advisable, the commission or the Director of Human Rights, may, upon application from the person who is entitled to the exemption or who seeks the exemption, by order made in accordance with any terms, conditions or criteria prescribed in the regulations, exempt that person or class of persons from any or all of the provisions of this Act, other than Part 1, or from any or all of the provisions of any other Act administered by the commission.

19529 In that letter The Saskatchewan Police Commission outlined the following procedure:

1. Applicants complete applications for employment Form R1.
2. Applicant is then finger printed and a C.P.I.C. (Canadian Police Information Center) check is made to determine if a criminal record is in existence.
3. Applicant then completes a personal history form, Form R3.
4. Applicant then completes a job related physical test on Form R3.
5. Applicant completes a standard educational test.
6. Applicant then submits to a medical examination.
7. Provided the applicant passes all the above requirements he or she is then formally interviewed by an officer, panel of officers or a Board of Police Commissioners to determine his or her suitability as a police officer and if the applicant is found to be suitable in all respects an offer of employment is made.

19530 In their letter the Saskatchewan Police Commission stated that the date of birth is required for three purposes:

1. To do a finger print check.
2. To make a C.P.I.C. check.
3. To determine whether the applicant is over the age of 18 years.

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19531 The letter went on to say that if an applicant had a criminal record of any consequence or was under 18 years of age then the application would not be proceeded with. Similarly if the applicant was found not to be medically fit to be a police officer then the application would be abandoned.

19532 The Saskatchewan Police Commission also expressed the opinion that there are no other duties in the Province of Saskatchewan that parallel the duties, responsibilities and authority of a police officer. They went on to say that a special screening procedure is required in the selection of police officers and that it was necessary to have the C.P.I.C. and medical information prior to the interview and offer of employment.

19533 On the application for employment form, R1, the following question is asked:

> Have you ever been charged with or convicted of a criminal, traffic or other offense other than an offense for which you have received a pardon that has not been revoked?

If the applicant answers yes, he is asked to explain. In addition, the application for employment Form R1, asks for the date of birth.

19534 Regulations pursuant to *The Police Act* passed by the Saskatchewan Police Commission on January 26, 1981 and approved by the Attorney General for the Province of Saskatchewan on March 27, 1981 provide:

> 2.01-(1) No person shall be appointed a member of a police force unless he or she
> (a) is 18 years of age or over. . . .
> (c) is certified by a qualified medical practitioner to be in good health, mentally and physically, and fit for duty as a member of a police force.
>
> 3.01-(1) A police force receiving an application for employment shall have the applicant
> (a) complete "Application for Police Employment", Form R1.
> (b) fingerprinted and subject to a fingerprint, C.P.I.C. and local indicies check to determine what, if any, criminal record is in existence. . . .
> (e) submit to medical examinations by a qualified medical practitioner as required by the Chief of Police on Form R4.
>
> 3.01-(2) Prior to a formal interview, the Chief of Police shall ensure that a thorough background and character investigation has been completed on the applicant.

19535 In a letter dated February 9, 1984 from the Saskatchewan Police Commission to Ms . Shelagh Day, Director of the Saskatchewan Human Rights Commission the following information regarding the police forces of Saskatchewan was provided.

Police Force	*Number of Members*
Regina	338
Saskatoon	313
Prince Albert	62
Moose Jaw	56
Estevan	17
Weyburn	17
Cudworth	1
Dalmeny	1
Luseland	1
Macklin	1
Martensville	3
Midale	1
Stoughton	1
Watson	1
Yellowgrass	1
R.M. of Corman Park	5
	Total 819

19536 The Police Commission also advised of the following:

1. Two of the major police forces completely screen an applicant and then make a job offer subject to a satisfactory medical report.
2. Two of the major police forces completely screen and require a medical before a job offer is made.

The letter of February 9, 1984 also states, "even though there may be very few apply with either a C.P.I.C. or fingerprint record . . .". It would appear from this statement that the Saskatchewan Police Commission acknowledges that there are very few people who actually apply for positions in a municipal police force who are eliminated because of a C.P.I.C. or fingerprint record.

In the February 9, 1984 letter the following statistics were given for the 1983 year:

REGINA

Vacancies — 16
Applicants — 133
Number completing screening process — 20
Number from outside province completing a screening — 5

SASKATOON

Vacancies — 7
Applicants — 135
Number completing screening process — 7
Number from outside province completing a screening — 12

PRINCE ALBERT

Vacancies — 1
Applicants — 120
Number completing screening process — 5
Number from out of province completing a screening — 0

MOOSE JAW

Vacancies — 2
Applicants — 100
Number completing screening process — 7
Number from out of province completing a screening — 0

REGINA POLICE FORCE

19537 In a letter dated January 3, 1984 to the Saskatchewan Police Commission the Regina Police Force advised that in its selection process, the police force takes these steps, in the following sequence (other steps are taken between the steps listed below):

Criminal check.

Interview by recruitment officer.

Applicant is sent for medical examination.

Applicant must then complete a series of job related physical tests.

Applicant then undergoes a polygraph examination.

Applicant is invited to interview with recruit selection board.

It should also be noted that the Regina Police Force hires candidates who are between the ages of 19 and 31. If they do not hire applicants who are over age 31, the Regina Police Force is discriminating on the basis of age in its employment process.

SASKATOON POLICE FORCE

19538 In a letter dated January 12, 1984 from the office of the Chief of the Saskatoon Police Force to the Saskatchewan Police Commission the following information was given. With the Saskatoon Police Force the following procedures are followed (other steps are taken between the steps listed below):

Applicant is asked to consult a doctor to determine whether he can perform a physical test.

Applicant is asked to perform a physical test.

Interview by the personnel inspector.

Applicant asked to submit fingerprints.

Personnel inspector evaluates applicants and selects three times the number of job positions available.

Selection committee interviews the applicants and selects the number of persons equal to the number of jobs available.

Successful applicants are notified, offered a job and requested to obtain a medical examination. They are told the job offer is dependant on the medical report being satisfactory.

The Saskatoon Police Force noted that it costs between $200.00 to $300.00 to process each applicant.

MOOSE JAW POLICE FORCE

19539 By letter dated January 24, 1984 from the Moose Jaw Police Force to the Saskatchewan Police Commission, the following information wås provided. Among others, the following steps are taken in the recruitment process by the Moose Jaw Police Force:

Background check is performed.

Candidates appear before a selection board.

A point system is used in the evaluation of a recruit and based upon the factor of age, the following points are allotted for the different ages.

Age	*Points*
35 and over	0
30 to 34	45
25 to 29	70
19 to 24	100

It should be noted that by allowing a different number of points for different ages the Moose Jaw Police Force is in fact discriminating on the basis of age in its employment process.

MEDICAL EXAMINATION FORM

19540 The Saskatchewan Police Commission has a medical examination form for police officer applicants. The form asks questions concerning a variety of medical difficulties, both past and present. It also requests a variety of medical information and asks the following question:

Is applicant physically fit for employment as a police officer?

The medical doctor must answer yes or no. The Saskatchewan Police Commission then provides a form called "Guide for Medical Examiners".

19541 It is the Saskatchewan Human Rights Commission's understanding that this medical form and medical guide are used by all the medical examiners for all of the police forces in the province.

HEARING OF APPLICATION

19542 On February 22, 1984 the Human Rights Commission convened to hear the application for an exemption pursuant to section 48 of *The Saskatchewan Human Rights Code* by the Saskatchewan Police Commission. Mr. Joudrey, Executive Director of the Saskatchewan Police Commission was the representative on behalf of the Saskatchewan Police Commission. In his remarks he emphasized the special nature of police forces in society.

19543 There is absolutely no doubt that police forces are given a great amount of authority by the society that they police. The Saskatchewan Human Rights Commission also acknowledges that individual police officers must be qualified and able to perform their duties. Throughout this decision, although it will not be mentioned again, the Saskatchewan Human Rights Commission does acknowledge the special status of police forces in our society and the special nature of the work done by police officers.

19544 At the hearing Chief Wes Stubbs of Prince Albert indicated that their medical examinations were conducted after the interview had been completed. An offer of employment is made provided that the candidate passes his or her medical examination. This is a procedure similar to the one used by Saskatoon.

19545 It was also pointed out that the candidate could have the medical examination where he resides. For example, applicants from out of the province could have a medical examination in their place of residence outside Saskatchewan.

19546 In 1983 two candidates were rejected for medical reasons and two candidates were rejected because of the C.P.I.C. test.

RECOMMENDATION OF THE STAFF

19547 The Saskatchewan Human Rights Commission has established a procedure wherein it receives a recommendation from the staff of the Human Rights Commission. The individual members of the Human Rights Commission are never involved in the receipt of the initial application and the exchange of correspondence between an applicant and the staff of the Commission. It is only when a matter is ready to proceed to the Commission for consideration that the individual members of the Saskatchewan Human Rights Commission receive the information submitted by the applicant. In order to assist it in its deliberation, the Saskatchewan Human Rights Commission asks the staff to prepare a report and a recommendation as to its position on the application in front of the Commission.

19548 The recommendation of the staff is not the position of the Saskatchewan Human Rights Commission but is taken into consideration in the Commission reaching its final decision, together with all other submissions. The Saskatchewan Human Rights Commission also then allows interested persons to make submissions to the Commission.

19549 The staff prepared a written report which was submitted to the Commission and made the following points:

1. Date of birth is required to make a C.P.I.C. check, in order to eliminate any misidentification which might arise because of persons having the same name;
2. The Saskatchewan Human Rights Commission does not wish to interfere with the security checks carried out by municipal police forces or the Saskatchewan Police Commission;
3. Application forms which require the date of birth can be used to discriminate on the basis of age, which is prohibited by Section 19 of *The Saskatchewan Human Rights Code*;
4. The date of birth of a candidate is not a neutral factor in the recruitment process and the staff referred to the Collective Bargaining Agreement with the Regina Police Force, where it specifies that a candidate for employment must be over 19 and under 31 years of age;
5. In the City of Moose Jaw, applicants are submitted to a rating scale on the basis of age;
5. The convenience arguments put forward by the Saskatchewan Police Commission do not justify deviating from the provision of Section 19 of *The Saskatchewan Human Rights Code*.

19550 On the question of the requirement of medical examinations the report of the staff made the following points:

1. Police work requires certain special skills and abilities, but abiding by the Saskatchewan Mining Association exemption order issued by the Saskatchewan Human Rights Commission does not prevent medical examinations from being performed on police officer candidates, nor does it prevent rejection of unfit candidates;
2. The Saskatchewan Mining Association exemption order does prevent any conduct of these medical examinations prior to an offer of employment made in writing;
3. Employers of police officers should not be viewed any differently than any other employer in the province;
4. The Saskatchewan Police Commission have made a "convenience" argument, but it might be more convenient for every employer in the province to have pre-employment medicals. It is the position of the staff that the protection of the rights of physically disabled persons is of greater importance than the "convenience" argument;
5. In 1983 there were 26 vacancies in the police forces of Regina, Saskatoon, Prince Albert and Moose Jaw. The total number of applications received were 488. 39 applicants completed the screening process and 17 of the applicants were from out of province;
6. Two municipal police forces screen applicants then make an offer of employment subject to a satisfactory medical examination. In effect, two of the police forces have taken steps to comply with the Saskatchewan Mining Association order.

19551 The staff went on to suggest that employment medicals should be specifically confined to assessing whether an individual has the specific ability required by the particular job. In conclusion, they recommended that the exemption to allow the date of birth on application forms for municipal police forces and to perform pre-employment medicals are not necessary or advisable and the Saskatchewan Human Rights Commission should deny the application made by the Saskatchewan Police Commission.

Interested Parties

19552 Interested parties were identified and notified of the oral hearing. Public notices announcing the hearing were placed in the Saskatoon *Star-Phoenix*, the Regina *Leader Post*, the North Battleford *News Optimist*, the Moose Jaw *Times Herald*, and the Prince Albert *Daily Express*. The Voice of the Handicapped, represented by Mel Graham, made a submisson. In addition, the Saskatchewan Federation of Labour submitted a written submission. After the hearing, written submissions were received from the Saskatchewan Police Federation, Disabled Persons Employment Service and the Weyburn City Policemen's Association. These late submissions were circulated to the Saskatchewan Police Commission and the interested parties.

DATE OF BIRTH ON APPLICATION FORM

19553 *The Saskatchewan Human Rights Code* provides as follows:

> Section 19:
>
> 19. No person shall use or circulate any form of application for employment to which this Act applies or publish any advertisement in connection with such employment or prospective employment or make any written or oral inquiry in connection with such employment that:
>
> (a) expresses, either directly or indirectly, a limitation, specification or preference indicating discrimination or an intention to discriminate on the basis of race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin;
>
> (b) contains a question or request for particulars as to the race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin of an applicant for employment.

19554 This section in effect provides that no person shall use any form of application for employment which expresses a limitation, specification or preference indicating discrimination on the basis of age or contains a question or request for particulars of the age of the applicant. Section 2 of *The Saskatchewan Human Rights Code* defines age as follows:

> 2. (a) "age" means any age of eighteen years or more but less than sixty-five years;

It is clear that pursuant to *The Saskatchewan Human Rights Code* one cannot ask a question as to the age of an applicant or the applicant's date of birth.

19555 The municipal police forces in its application for employment are entitled to ask the question:

> Is the applicant under the age of 18 years or more than 64 years of age?

and require a yes or no answer.

19556 In the application of the Saskatchewan Police Commission three reasons were given for requiring the date of birth on the application form:

1. C.P.I.C. check.
2. Fingerprint check.
3. To determine whether the applicant was over 18 years of age.

It is clear that the Saskatchewan Police Commission can find out by a properly drafted question whether the applicant is 18 years of age or more. Therefore, the third reason given for requiring the date of birth must be discounted.

The other two reasons centre around doing a check for criminal record on the applicant. An employer is completely free to ask an applicant on the application form and in the interviews whether he or she has a criminal record and is completely free to request details of that criminal record. In doing a background check a police force is free to ask any other third party as to whether they have any knowledge of the applicant's past criminal record. When the polygraph test is performed an applicant can be asked whether he or she has a criminal record and for details of that crimninal record.

19557 In fact, an applicant can be advised prior to completing any application form that questions regarding his or her criminal record will be asked and any misrepresentation will mean automatic disqualification for the position. Warning could also be given at the interview stage and at each and every stage along the way where there is contact with the applicant. The evidence presented at the hearing indicated that out of 488 applications, only 2 were rejected as a result of the C.P.I.C. check. This would indicate that misrepresentation by individuals as to their criminal record is not a serious problem.

19558 It should be pointed out that after a conditional offer of employment is made an employer is entitled to request the successful applicant's date of birth and then is entitled to use that date of birth to do a C.P.I.C. and fingerprint check. A requirement set out in Section 19 of *The Saskatchewan Human Rights Code* relates to pre-employment and it does not prevent the asking of the question re: date of birth after an offer of employment is made. In addition there is no prohibition in *The Saskatchewan Human Rights Code* from making an offer of employment conditional on a satisfactory C.P.I.C. and fingerprint check. If such a procedure had been used by the municipal police forces of Saskatchewan, based on the statistics at the hearing, only 2 applicants who would have received offers of employment conditional on a satisfactory C.P.I.C. and fingerprint check would have been rejected because of their failing the C.P.I.C. or fingerprint check. This is pointed out because the Saskatchewan Police Commission made a submission that for the sake of convenience it was important to ask the question re: date of birth on the application form. The convenience argument does not stand up when only 2 appicants in 1983 were rejected out of 488 applicants because of their C.P.I.C. or fingerprint checks.

19559 The other argument presented was that to make an offer of employment and then find the individual had a criminal record would be extremely embarrassing to the police force in question. We do not see an offer of employment subject to a satisfactory C.P.I.C. and fingerprint check (in other words, subject to proof of no criminal record) an offer of a type which would cause embarrassment if, because the applicant had lied on his application form and in his interview, he is found out now to have a criminal record. That applicant would have misrepresented his criminal record to the police force and thus the employer would be totally justified to disqualify the person from that job, when a subsequent check determines that the candidate had been lying to his prospective employer. The material submitted by the Saskatchewan Police Commission indicated that the date of birth now requested by the municipal police forces has been used in a discriminatory manner. The Regina police force has required applicants to be between the age of 19 and 31. The Moose Jaw police force still gives additional points to applicants who are younger based on age. Both practices discriminate against applicants on the basis of age. It was not the purpose of this hearing and it was not requested by the Saskatchewan Police Commission that the Saskatchewan Human Rights Commission consider age as a reasonable occupational qualification pursuant to Section 16(7) of *The Saskatchewan Human Rights Code*. Since this was not part of the application we do not need to consider this question further, but suffice it to point out that we are now faced with an application by the Saskatchewan Police Commission and the municipal police forces of the Province requesting that they be allowed to ask date of birth on their application forms when some municipal police forces are using age and date of birth for purposes which are contrary to *The Saskatchewan Human Rights Code*.

19560 It is the conclusion of the Saskatchewan Human Rights Commission that the requirement of the date of birth on the application form for police officers is not necessary and therefore the application of the Saskatchewan Police Commission is denied.

19561 It should be made perfectly clear that this does not prevent the Saskatchewan Police Commission or municipal police forces, upon making an offer of employment subject to a satisfactory C.P.I.C. and fingerprint check, from asking for the successful applicant's date of birth and from advising him or her that if he or she does not successfully pass the C.P.I.C. or fingerprint test, he or she will not be eligible for the job.

PRE-EMPLOYMENT MEDICAL EXAMINATIONS

19562 The Saskatchewan Police Commission has also applied for an exemption allowing it and the municipal police forces of the Province to require a medical examination prior to an offer of employment. The Saskatchewan Human Rights Commission has dealt with the question of pre-employment medical examinations in a Saskatchewan Mining Association Order dated October 13, 1982, No. 82/12EO. This order sets out the position of the Saskatchewan Human Rights Commission as it existed prior to the application by the Saskatchewan Police Commission. The order stated as follows:

> The only exemption provided by the existing order is from Section 19 which prohibits any pre-employment inquiry with respect to physical disability. The exemption allows an employer, prior to hiring, to ask on an application form or in person "do you have a physical disability which will interfere with your ability to perform the job for which you have applied?" The opportunity to ask this threshold question coupled with the opportunity for any employer to inquire as to an applicant's ability to perform the specific duties required by any particular position (e.g.: can you drive, type, lift, climb, etc.) will allow an employer to determine whether an applicant can perform the job in question, or, alternatively, whether the job function which an applicant cannot perform because of a disability can be accommodated by job redesign or aides.

19563 It should be noted that an employer can ask the question:

> Do you have a physical disability which will interfere with your ability to perform the job for which you have applied?

The employer is entitled to ask this threshold question. The employer can also ask whether the applicant can perform specific duties of the job. The employer can ask: can you drive? can you run? can you use a firearm? can you climb? can you lift? or any other question that inquires as to whether the applicant can perform the duties of the job.

19564 The order goes on to state:

> Except for the threshold question, no other exemption is allowed by the order from Section 19 or any other section of the Code.
>
> Thus, the pre-placement as well as the pre-transfer medical examinations which are addressed in the exemption order are conducted subject to the provisions of Section 16 rather than 19 because they take place after an offer of employment has been made in writing. In order to comply with the requirements of Section 16, such an offer of employment can only lawfully be withdrawn once there is a determination that there is a reasonable occupational requirement for a certain physical ability which the employee in question cannot meet.
>
> Section 16 requires that there be no discrimination "with respect to employment, or any term or condition of employment, because of . . . physical disability". In order to comply with this requirement, it is necessary that if pre-placement medical examinations are conducted, they be required of all employees being considered for a particular position and not just of those with a real or perceived disability. If pre-placement medical examinations were required only of those with a real or perceived disability this would constitute differential terms or conditions of employment because of physical disability and would also invite the possibility of disabled persons being subject to more stringent physical or medical requirements than others not so identified.

19565 This portion of the order contemplates that medical examinations can only be required after an offer of employment has been made. Such an offer of employment can only be withdrawn once there is a determination that there is a reasonable occupational requirement for a certain physical ability which the employee cannot meet.

19566 The order goes on to state at the bottom of page 7:

> Over the period the exemption order has been in effect, it has been brought to the Commission's attention that some employers may be interpreting the order as a broad approval for any and all employment related medical examinations. Such a view is in error. Section 16(7) of *The Saskatchewan Human Rights Code* provides that the prohibition against discrimination on the basis of physical disability does not apply where physical ability is a reasonable occupational requirement for the position of employment. The definition of reasonable occupational requirement provided in the Regulations states that it is "a qualification that renders it necessary to hire . . . (persons with a certain physical ability exclusively in order that the essence of the business is not undermined . . . or in order that the duties of a job involved can be performed safely."
>
> The terms of the Code and Regulations are plain. They do not invite employers to conduct medical examinations at will. Only for those positions where the essence of the business will be undermined or the safe performance of duties threatened by persons who lack a certain physical ability are medical examinations called for. In every other case, the general provisions of Section 16 which prohibit discrimination on the basis of physical disability apply, and where there is no reasonable occupational requirement there is no need for medical examinations.

19567 It should be noted that *The Saskatchewan Human Rights Code* and its accompanying Regulations are clear in that medical examinations are allowed, "Only for those positions where the essence of the business will be undermined or the safe performance of duties threatened by persons who lack a certain physical ability . . .".

19568 The order then states:

> **ORDER**
>
> For all the above reasons the Saskatchewan Human Rights Commission hereby considers it necessary and advisable to continue to exempt all employers from Section 19 of *The Saskatchewan Human Rights Code*, to this limited extent:
>
> > Job applicants may be asked whether they have a physical disability which will interfere with their ability to perform the job for which they have applied. Employers or persons may also make a pre-employment inquiry with respect to an applicant's ability to perform specific job-related functions. However, at no time on an application form or during pre-employment inquiry may an employer inquire into the nature or severity of a physical disability. Medical examinations may be conducted and the provisions of Section 19 will not apply to such examinations provided that Section 16 is complied with in the following manner:
> >
> > A) Where an offer of employment has been made in writing and where a reasonable occupational requirement has been identified which requires a certain physical ability, a pre-placement medical examination may be conducted so as to ascertain

that an employee has the required physical ability, provided that:

i) All employees offered the same or similar positions by a particular employer are subject to the condition of such an examination regardless of physical disability:

ii) Examinations conducted are the same for male and female employees except where a reasonable occupational requirement has been identified which affects one sex only.

B) Where an offer of a different position of employment has been made to an employee, a medical examination may be conducted prior to such employee's entrance on such different employment where there is a reasonable occupational requirement for such position or employment which has been identified as requiring a certain physical ability and all employees to whom the offer is extended are subjected to the same examination regardless of physical disability or sex.

C) The information obtained by an employer from a medical examination conducted in accordance with this order as to the medical condition or history of the person examined shall be collected and retained separate from personnel records and shall be accorded confidentiality and used for no other purpose except to determine whether the person in question can meet the reasonable occupational requirement for the position in question.

D) Without limiting the generality of the foregoing, employers may inform:

i) Foremen, supervisors and managers or persons holding like positions regarding restrictions on the work duties of a person with a physical disability or accommodations which should be made; and

ii) First aid and safety personnel, where appropriate, if the person with the physical disability might require emergency treatment.

This exemption order shall take effect thirty days from today's date, unless one or more of the parties shows cause to the Commission, through the Office of the Chief Commissioner, why it should not be published in its present form.

Dated at Saskatoon, this 13th day of October 1982.

19569 It will be noted that any employer, including a municipal police force can, pursuant to this order, conduct medical examinations provided that Section 16 of *The Saskatchewan Human Rights Code* is complied with, where an offer of employment has been made in writing and where a reasonable occupational requirement has been identified which requires a certain physical ability and "only for those positions where the essence of the business will be undermined or the safe performance of duties threatened by persons who lack a certain physical ability . . .".

19570 Under the above referred to order, the Saskatchewan Police Commission and the municipal police forces are entitled to conduct medical examinations provided they follow the procedure and the requirements as set out in the above order. The order referred to above in no way prohibits a municipal police force from requiring medical examination of applicants applying for positions as police officers. It is clear that such medical examinations cannot be required prior to a written offer of employment. Such a medical examination can be required, after a written offer of employment, provided the municipal police force complies with the requirements of the above referred to order and *The Saskatchewan Human Rights Code* and its accompanying Regulations.

19571 The above referred to order in no way requires any employee in the Province of Saskatchewan, including municipal police forces, to hire persons who cannot perform the duties of the job for which they are being hired. The order merely indicates when a medical examination can be done and upon what conditions an employer is entitled to require such medical examinations. The order does not result in a lowering of standards for applicants that would be eligible for jobs. The order cannot be accused of increasing the risk of public safety in relation to the applicants that will be eligible for certain jobs.

19572 One could ask whether the above referred to order is completely and totally applicable to municipal police forces of the Province. It is the conclusion of the Human Rights Commission that it is. The order allows a police force to require a medical examination where the police force can show that there is a reasonable occupational requirement regarding certain abilities as set out in Section 16(7) of *The Saskatchewan Human Rights Code*. The order does not prohibit the requiring of a medical examination, but only indicates the time at which such medical examination can be performed.

19573 The Saskatchewan Human Rights Commission notes that of the four major municipal police forces in this Province, two of those municipal police forces are already complying with the order. In particular, the Saskatoon Police Force has been requiring a medical examination after an offer of employment. At the hearing Chief Penkala, Chief of the Saskatoon Police Force, did not refer to any serious administrative difficulties in carrying out the hiring procedure in this manner. Similarly, Prince Albert is requiring a medical after an offer of employment. The Police Chief of Prince Albert, Mr. Stubbs, did not mention any serious administrative difficulties in this type of hiring procedure.

19574 The Saskatchewan Police Commission suggested that it would be more convenient to do the medical examination prior to making an offer of employment. We were given the statistics that out of 488 candidates only 2 were rejected because of their medical examination. This would suggest that rejection of candidates because they had failed the medical examination has not been a significant matter. Changing the time when the medical examination will be done will not increase the inconvenience to municipal police forces.

19575 It was also submitted by the Saskatchewan Police Commission that there were out-of-province applicants who might be inconvenienced because of the requirement of medical examinations after an offer of employment. It is necessary to refer to the fact that out of 488 candidates only 2 of those candidates were rejected because of their medical examination. No indication was given as to whether one or both of those candidates rejected were from out of the province. It should be noted that an out-of-province applicant can go to a doctor in the place of his residence for his medical examination. There is no need for he or she to make a second trip to Saskatchewan for the purposes of the medical. In addition the out-of-province applicant is in the best position to evaluate his or her personal state of health before making application for employment as a police officer. If that out-of-province applicant could not evaluate his or her state of health, he or she would be free to visit his or her medical doctor and receive personal advice as to his or her state of health. This could be done prior to incurring any expense in travelling to Saskatchewan for an interview or examination. It might be argued that the out-of-province applicant would have to travel to Saskatchewan in order to be involved in the interview and then might not obtain the position because he or she did not pass the medical examination. It should be noted that out-of-province applicants travel to Saskatchewan at their own expense for job interviews. This is not an expense of the municipal police forces. If the Saskatchewan Human Rights Commission were to take into account any factor it would be more logical to take into account the cost to a municipal police force, rather than the cost to an applicant who resides outside the Province of Saskatchewan. Again, it must be noted, that at worst in 1983, only 2 applicants were rejected because they did not pass the medical examination.

19576 One cost the municipal police force has to bear is the cost of the medical examination. If all the major municipal police forces performed a medical examination prior to a job offer, it would appear that they would be administering medical examinations to 488 applicants. If on the other hand, medical examinations were not performed until after a written offer of employment, the four major municipal police forces would have required 26 medical examinations to be performed. Again, we note that in 1983, 2 candidates failed their medical examination. In 1983, then, a maximum of 28 medical examinations may have been required. It would appear that is a cost saving for municipal police forces when medical examinations are performed after a written offer of employment is made.

19577 At the hearing varying costs were given to process an individual applicant for a police officer. The Regina Police Force indicated that it costs them from $200.00 to $300.00 to process an applicant. Assuming the cost of processing an applicant was $300.00 and assuming that the C.P.I.C. and fingerprint checks and the medical examination were performed after the written offer of employment, in 1983, the municipal police forces would have rejected 2 persons because of failure to pass the C.P.I.C. or fingerprinting checks and 2 persons because of failure to pass the medical examination. The maximum processing cost for these 4 applicants would have been $1,200.00 for the Regina Police Force. This cost does not appear to be significant. In fact, this cost would be balanced off by the cost saving obtained by performing medical examinations after the offer of employment.

19578 It is the Commission's conclusion therefore, that the convenience and cost arguments cannot be accepted. If there is any inconvenience it is minimal and, if anything, there is a cost saving in requiring medical examinations only after a written offer of employment has been made. Therefore, the Saskatchewan Human Rights Commission denies the application of the Saskatchewan Police Commission for an exemption allowing it to require medical examinations prior to an offer of employment.

19579 In this denial, the Saskatchewan Human Rights Commission has reached the conclusion that the exemption is not necessary or advisable. The Saskatchewan Mining Association order, No. 82/12EO, dated October 13, 1982 is an appropriate exemption for all employers of the Province of Saskatchewan and is appropriate to municipal police forces in the Province of Saskatchewan.

19580 In this application, the Saskatchewan Police Commission asked the Saskatchewan Human Rights Commission to consider two exemptions, one relating to date of birth and one relating to medical examinations and no other issues were under consideration. It is necessary, after hearing the evidence of the Saskatchewan Police Commission, to note that a review of their hiring process might be advisable. Two police forces have used age of an applicant in a way which is discriminatory. The medical examination form and the guidelines that accompany it indicate numerous health items which might disqualify an applicant from being eligible to be hired as a police officer. Section 16(7) of *The Saskatchewan Human Rights Code* provides that a specification based on physical disability is permitted where the physical ability is a reasonable occupational qualification and requirement for the position. In reviewing the medical examination form and the guidelines thereto, one is left with the question as to whether the Saskatchewan Police Commission could show that each item of health that is a disqualification is, in fact, a reasonable occupational qualification and requirement. If an unsuccessful applicant laid a complaint under *The Saskatchewan Human Rights Code*, of discrimination on the basis of physical disability, and the Saskatchewan Police Commission or one of the municipal police forces could not prove that the particular item of health in question was a reasonable occupational qualification and requirement, the Saskatchewan Police Commission or the municipal police force would be held to be in violation of *The Saskatchewan Human Rights Code*. As previously indicated, this matter was not the substance of the application before the Saskatchewan Human Rights Commission and it is only pointed out for the assistance of the Saskatchewan Police Commission and its municipal police forces.

SUMMARY

19581 Therefore, the Saskatchewan Human Rights Commission, for all the reasons given above denies the application of the Saskatchewan Police Commission for an exemption pursuant to Section 48 of *The Saskatchewan Human Rights Code*, to allow it to require the age of an applicant for employment as a police officer and to allow it and its municipal police forces to perform medical examinations prior to making an offer of employment. In denying this application, the Saskatchewan Human Rights Commission has been very aware of the special status of police forces in our society and in denying this application, is of the opinion that in no way has it jeopardized that special status or reduced the ability of municipal police forces to employ qualified police officers who are physically fit to perform their duties.

The Saskatchewan Human Rights Commission is of the opinion that the existing law in the Province of Saskatchewan permits the Saskatchewan Police Commission and municipal police forces to maintain their special status and to recruit peace officers who are qualified and who are physically fit to perform their duties.

**CANADIAN
HUMAN RIGHTS
REPORTER**

**SASKATCHEWAN / EMPLOYMENT /
SEXUAL HARASSMENT
Board of Inquiry
Claudette Phillips (Auger) v. John Hermiz**

Volume 5, Decision 400 Paragraphs 20294 - 20326 November-December, 1984

Board of Inquiry Decision under the
SASKATCHEWAN HUMAN RIGHTS CODE

Claudette Phillips (Auger)
Complainant

v.

John Hermiz
Respondent

Date:	September 26, 1984
Place:	Saskatoon, Saskatchewan
Before:	Randy K. Katzman
Appearances by:	Genevieve Leslie, Counsel for the Saskatchewan Human Rights Commission

Summary: *The Board of Inquiry finds that Claudette Phillips (Auger) was sexually harassed by John Hermiz while she was in his employ. The harassment was both verbal and physical. Ms. Phillips' refusal to comply with Hermiz' sexual demands resulted in her working hours being reduced and in her eventually being fired from her job.*

The respondent, John Hermiz, did not appear. The Board of Inquiry finds the complainant credible and candid and accepts her uncontested evidence.

Ms. Phillips' evidence is that on three separate occasions John Hermiz grabbed her and touched her breasts, forcing her to fight her way free. He also at different times asked her if she knew any woman he could take out, and wondered why she wasn't nice to him. After the second incident and Ms. Phillips' second rejection of Hermiz advances, her work hours were reduced. After the third incident, she was fired.

The Board awards Ms. Phillips 425 dollars in compensation for lost wages and 1,750 dollars in general damages.

20294 On April 19, 1984 the Board of Inquiry having given all parties to the matter notice of its intention to do so, commenced a formal inquiry into the complaint of Claudette Phillips (Auger) against the Respondent, John Hermiz. The complaint alleged that violation of *The Saskatchewan Human Rights Code* (hereinafter referred to as The Code) took place from on or about the first week in December 1982 to the 13th day of January, 1983 when the complainant was discriminated against by the Respondent because of sex.

20295 The complaint alleged the following particulars:

(1) I was employed by John Hermiz from mid-November, 1982 until January 13th, 1983 as a clerk/receptionist for Hermiz Electronics Service. During my employment I was subjected to both physical and verbal sexual harassment by my employer, John Hermiz, particulars of which are as follows:

(2) On or around the first week in December, 1982, the respondent called me into the back of his shop and sought my assistance in finding other women for sexual purposes and also made sexual advances towards me. When I informed him that I would not assist him and rejected his advances, he became upset and forced physical contact of a sexual nature. I was able to break free when a customer came into the store.

(3) Up to the time of the above incident, I had been working 3 or 4 days per week. After the incident my time was cut to 1 or 2 days a week.

(4) On or about December 13th, 1982, Hermiz called me into the back of his shop and again made sexual advances which I rebuffed. He then forced physical contact of a sexual nature, touching and grabbing at my body, and when I managed to get away he referred to me as a "bitch" and vowed to eventually have intercourse with me.

(5) After this incident, I was only required to work a few hours for the rest of December, 1982 and did not see Hermiz again until January, 1983.

(6) On or about January 7th, 1983 Hermiz repeated that he was going to have intercourse with me and questioned me as to why I would not comply.

(7) The final incident occurred on January 11th, 1983 when Hermiz again physically attacked me, and offered me full-time employment. I again fought him off. This conduct resulted in shouting and yelling in which Hermiz referred to me as a "bitch" and a "slut." Hermiz informed me that my employment was terminated on January 13th, 1983.

(8) All of the above incidents occurred while the respondent required me to be alone with him, supposedly for the purpose of work related duties. All advances were rejected and in no way encouraged. These incidents which I tolerated only because I needed the employment, were extremely upsetting for me and placed me in continual fear of forced sexual contact and physical abuse.

(9) I believe that the above incidents of sexual harassment created a very negative psychological atmosphere in which I had to work. As well, I believe that my refusal to comply with the respondent's advances resulted in the cutting of my hours of work and finally in the termination of my employment. I further believe this to be in violation of Section 16(1) of *The Saskatchewan Human Rights Code*.

20296 The relevant provisions of The Code are as follows:

> "No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term or condition of employment, because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin."

20297 As pointed out by Counsel for the Complainant and the Saskatchewan Human Rights Commission, this is the first sexual harrassment case to be adjudicated under section 16(1) of The Code and this Board has found it useful to consider how other jurisdictions have dealt with cases involving alleged sexual harassment.

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20298 The Board finds the decision of an Ontario Board of Inquiry *re Bell and Korczak* v. *Ernest Ladas and The Flaming Steer Steak House*, (1980) 1 C.H.R.R. 155 particularly useful in first understanding the purpose of the *Ontario Human Rights Code*, R.S.O. 1980 c. 340 section 4(1) and second in establishing that sexual harassment is a form of discrimination based on sex.

20299 The relevant provisions of the Ontario Code considered in *re Bell* are as follows:

> 4(1) No person shall,
>
> (b) dismiss or refuse to employ or to continue to employ any person;
>
> (g) discriminate against any employee with regard to any term or condition of employment, because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such person or employee.

20300 Chairman Shime in *re Bell* stated that in his view "the purpose of The Code (Ontario) is to establish uniform working conditions for employees and to remove those matters enumerated in Section 4 (our Section 16) as relevant considerations in the work place. Consideration of matters such as race, creed, colour, age, sex, marital status, nationality or place of origin strike at what the preamble of The Code refers to as the foundation of freedom, justice and peace. The Code prohibits these values from becoming negative factors in the employment relationship."

20301 Chairman Shime continues at paragraph 1388 to say that "discrimination based on sex is prohibited by The Code. Thus the paying of a female person less than a male person for the same job is prohibited, or dismissing an employee on the basis of sex is also prohibited. But what about sexual harassment? Clearly a person who is disadvantaged because of her sex is being discriminated against in her employment when employer conduct denies her financial rewards because of her sex, *or exacts some form of sexual compliance to improve or maintain her existing benefits*. The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work place, and all of its benefits free from extraneous pressure having to do with the mere fact that she is a woman. Where a woman's equal access is denied *or when terms and conditions differ when compared to male employees, the woman is being discriminated against*."

20302 I believe the above clearly sets out the actions which are to be prohibited by our legislation as well.

20303 In giving testimony, the Board found the Complainant to be a very credible witness and believed her to be completely candid when giving evidence.

20304 The Respondent, John Hermiz, simply chose not to appear before the Board of Inquiry. There is no doubt that the Respondent knew of the existence of this Board of Inquiry as he contacted the Chairman and informed him he would not be in attendance. The Board of Inquiry ordered the matter to proceed in the absence of the Respondent or anyone appearing on his behalf as was similarly done in *Hughes and White* v. *Dollar Snack Bar and Dieter Jackel*, (1982) 3 Canadian Human Rights Reporter, 1014.

20305 The first alleged incident occurred in the first week of December, 1982 when the Respondent summoned the Complainant to the back room and after having asked the Complainant if she knew of any woman he could take out the Respondent grabbed the Complainant and put his hand underneath her shirt.

20306 On or about the 13th day of December, 1982 the Respondent summoned the Complainant to the back room, and then after a brief discussion involving bosses receiving sexual favours from their employees the Complainant was grabbed by the Respondent who then forcefully put his hand under her shirt.

20307 It was after this incident that the Complainant discussed what was happening at the work-place with her sister-in-law and her fiance, Kim Phillips.

20308 The Complainant testified that subsequent to the second incident her hours of work were noticeably reduced and she was not called to return to work until the 7th day of January, 1983. On that date the Respondent put his arms around the Complainant, which she removed, and he then enquired why she wasn't nice to him, and finally walked away from the Complainant.

20309 The Complainant was called back to work on January 11, 1983. She was summoned to go to the back room where once again she was grabbed, restrained by the Respondent, who took this opportunity to place his hand under her shirt. While this incident was taking place the Respondent enquired of the Complainant if she would like full-time employment.

20310 The Complainant immediately left work after this incident. The Respondent called her to come to work on the 13th day of January and on that date her position was terminated.

20311 The Complainant testified that the amount of business her employer did increased in the time period she worked for him and that one week after being terminated she found part-time work and in the second week of February, 1983 she was successful in obtaining full-time employment.

20312 As counsel for the Complainant and Saskatchewan Human Rights Commission noted, the Complainant and the Respondent were working alone at the employer's store when these incidents occurred and therefore no witnesses to these events could be produced. Further these events took place in the back room where the general public would not have access.

20313 The Board of Inquiry heard evidence from Kim Phillips who testified that the Complainant reported the second and fourth incidents to him, and his testimony was consistent with that of the Complainant, and therefore so far as it is relevant by way of prompt complaint, the Board of Inquiry finds the evidence of Kim Phillips to be corroborative.

20314 On the evidence presented to this Board of Inquiry it is clear that John Hermiz sexually harassed the Complainant. As stated earlier the Board agrees with the view expressed by Chairman Shime in *re Bell and Korczak, supra,* that sexual harassment can be a form of sex discrimination prohibited by section 16 of The Code.

20315 This Board adopts the definition of sexual harassment used in *Teresa Faye Cox and Debbie Cowell* v. *Jagbritte Inc. and Super Great Submarine and Good Eats and Jagjit Singh Gadhoke,* (1982) 2 C.H.R.R. 609 (Ontario) which is as follows:

> "uninvited attention of a sexual nature: [an] implied or expressed promise of reward for complying with a sexually oriented request: or [an] implied or expressed threat of reprisal, actual reprisal, or the denial of opportunity for refusal to comply with a sexually-oriented request."

20316 The Complainant's position was terminated because she did not comply with her employer's sexually-oriented requests. The Board finds that there was a clear causal connection between the Complainant's dismissal and her rejecting of her employer's sexual advances.

20317 Further, prior to the Complainant's termination the Respondent's hours were reduced because she did not comply with her employer's sexual advances. Although the amount of business being conducted had increased the Complainant's hours were reduced. The Board cannot think of an alternative explanation for her hours being reduced.

20318 The Board finds that the Respondent attempted to exact sexual favours from the Complainant and her refusal to provide such was the reason for reduction of hours of work and then, termination of her job.

20319 The Board of Inquiry has no alternative but to conclude that the Respondent breached section 16 of The Saskatchewan Human Rights Code as he discriminated against the Complainant because of her sex.

20320 As to damages the Complainant suffered a loss of wages as a result of her hours being reduced. The Complainant suffered a loss of wages of approximately $85.00 per week for five weeks of $425.00.

20321 The Board of Inquiry has no hesitation in deciding that this would be an appropriate case to award general damages. Section 31(8) of The Code clearly states that where there is a wilful or reckless contravention of the Act or where the person injured by the contravention has suffered in respect of feeling or self respect as a result of the contravention, the Board of Inquiry may make an Order for compensation.

20322 The Board of Inquiry finds the Respondent's conduct constituted a wilful violation of The Code and the Complainant has suffered a great deal in respect of hurt feeling and loss of self respect as a result of the contravention.

20323 Factors which should be considered in an award of general damages in cases involving sexual harassment are set out by Chairman Cumming in *Rosanne Torres* v. *Royalty Kitchenware Limited and Francesco Guercio* (1982) 3 C.H.R.R. 176 (Ontario).

20324 These factors are as follows:

(i) The nature of the harassment, was it verbal or was it physical as well?
(ii) The degree of aggressiveness and physical contact in the harassment;
(iii) The ongoing nature;
(iv) The frequency of the harassment;
(v) The age of the victim;
(vi) The vulnerability of the victim;
(vii) The psychological impact of the harassment upon the victim.

20325 We have a situation where the victim was nineteen years of age at the time of the incident. She was economically vulnerable. She was subjected to an ongoing harassment which was physical. The harassment caused her severe injury to her feelings and self esteem.

20326 The Board of Inquiry finds that these factors justify an Order under Section 31 (8) of The Code.

ORDER

THIS MATTER coming on for hearing the 19th day of April, A.D. 1984, before a Board of Inquiry, efforts at settlement having failed, and the Minister having directed a formal inquiry pursuant to Section 20 of The Saskatchewan Human Rights Code, in the presence of counsel for the Commission, who also acted as counsel for the Complainant, with the Respondent not in attendance;

UPON HEARING the evidence adduced by the parties and what was alleged by all parties on the 19th day of April, 1984, and upon the findings of the Board of Inquiry that the complaint of Claudette Phillips (Auger) against John Hermiz was well founded and that she was discriminated against on the basis of her sex in relation to her employment as alleged;

IT IS HEREBY ORDERED AND DECLARED that the Respondent pay to the Complainant, Claudette Phillips (Auger), as compensation in respect of hurt feelings and loss of self-esteem, the sum of One Thousand Seven Hundred and Fifty ($1,750.00) Dollars by forwarding the said sum of One Thousand Seven Hundred and Fifty ($1,750.00) Dollars on or before the 1st day of November, A.D. 1984 to the offices of The Saskatchewan Human Rights Commission at 8th Floor, Canterbury Towers, 224 - 4th Avenue South, Saskatoon, Saskatchewan, S7K 5M5.

AND IT IS FURTHER ORDERED that the Respondent pay damages for lost wages to the Complainant, Claudette Phillips (Auger), in the sum of Four Hundred and Twenty-Five ($425.00) Dollars on or before the 1st day of November, A.D. 1984.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 26th day of September, A.D. 1984.

Board of Inquiry
Randy Kim Katzman
Chairperson